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No. 80-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, AND J. THEODORE DIADIUN,

Petitioners,

v.

MICHAEL MILKOVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Questions Presented

1. Is it consistent with the First and Fourteenth Amendments to the United States Constitution for a newspaper which has published an article containing an opinion which is held to "conflict with a judicial determination of the truth" rendered in a case to which the newspaper was not a party to be thereby deprived of the absolute protection afforded in libel cases for the expression of opinion?

2. Is it consistent with the First and Fourteenth Amendments to the United States Constitution for a newspaper which has published an article containing a purported statement of fact to be deprived of the defense of truth in a libel case because the statement is held to "conflict with a judicial determination of the truth" rendered in a case to which the newspaper was not a party?

3. Is it consistent with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) for actual malice to be established against a newspaper on the basis of a "judicial determination of the truth" rendered in a case to which the newspaper was not a party?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
The Trial	8
The Decision of the Court of Appeals	9
The Ohio Appeal and the Motion for Certification	11
REASONS FOR GRANTING THE WRIT	12
I. The Determinations of the Ohio Courts Are Inconsistent With the Absolute Protections Afforded by the First Amendment With Respect to the Expression of Opinion and of Truthful Facts	12
II. The Decision of the Supreme Court of Ohio is a Final Judgment and in All Respects Ripe for Review	21
CONCLUSION	25
APPENDIX	1a

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Table of Authorities

Cases: PAGE

Bilgrien v. *Ulrich*, 150 Wis. 532, 137 N.W. 759 (1912) 19
Bridges v. *California*, 314 U.S. 252 (1941) 15, 16n

Coffey v. *United States*, 116 U.S. 436 (1886) 18n
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 22
Cook v. *Field*, 170 Eng. Rep. 564 (1788) 16
Corbley v. *Wilson*, 71 Ill. 209 (1874) 19
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 15, 22, 23, 24
Craig v. *Harney*, 331 U.S. 367 (1947) 15, 16n
Craig v. *Moore*, 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. 1978) 14
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 3

Edwards v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) 14
England v. *Bourke*, 170 Eng. Rep. 545 (1800) 16

Fitchette v. *Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828 (1928) 20

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 15, 15n, 20, 21n
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 14, 15
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 22

Helsham v. *Blackwood*, 138 Eng. Rep. 412 (1851) 16
Helvering v. *Mitchell*, 303 U.S. 391 (1938) 18n
Henderson v. *Fox*, 80 Ga. 479, 6 S.E. 164 (1888) 20
Herbert v. *Lando*, 441 U.S. 153 (1979) 20, 21n

PAGE

Hoag v. *Charlotte Republican-Tribune*, 5 Med. L. Rptr. 1535 (Mich. Cir. Ct. 1979) 14

Local 438, Construction Laborers v. *Curry*, 371 U.S. 542 (1963) 22

Matthews v. *Huwe*, 269 U.S. 262 (1925) 22n
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 22, 23
Mills v. *Alabama*, 384 U.S. 214 (1966) 23n
Murphy v. *United States*, 272 U.S. 630 (1926) 18n

National Socialist Party of America v. *Village of Skokie*, 432 U.S. 43 (1977) 24n
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1976) ..... i, 20, 21
NLRB v. *B.D. Holt Co.*, 516 F.2d 505 (5th Cir. 1975) 14

Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. *Austin*, 418 U.S. 264 (1974) 14
One Lot Emerald Cut Stones and One Ring v. *United States*, 409 U.S. 232 (1972) 18n

Pennekamp v. *Florida*, 328 U.S. 331 (1946) 16

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 22-23
Risk Allah Bey v. *Whitehurst*, 18 L.T.R. 615 (1868) 17
Rosenbloom v. *Metromedia, Inc.*, 289 F.Supp. 737 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971) 19n

Smith v. *Levitt*, 227 F.2d 855 (9th Cir. 1955) 14
St. Amant v. *Thompson*, 390 U.S. 727 (1968) 20, 21n

PAGE

Stone v. *United States*, 167 U.S. 178 (1897) 18n

Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) 15
Titus v. *Wallick*, 306 U.S. 282 (1939) 22n
Tumey v. *Ohio*, 273 U.S. 510 (1927) 22n

United States v. *National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950) 18n

Wood v. *Georgia*, 370 U.S. 375 (1962) 15, 16n

Constitutions:

Ohio Constitution, Art. IV, § 2(B)(2) 11n, 23n

U.S. Constitution
Amend. I ..... *passim*
Amend. XIV ..... *passim*

Law Reviews:

Comment, *Evidence: Judgments: Res adjudicata: Admissibility of criminal judgment in a subsequent civil action*, 17 Cornell L.Q. 493 (1932) 18n

Note, 35 Cornell L.Q. 872 (1950) 18n

Note, 1962 Duke L.J. 97 ..... 18n

Note, *Judgments As Evidence*, 46 Iowa L. Rev. 400 (1961) 18n

Schauer, *Language, Truth and the First Amendment*, 64 Va. L. Rev. 263 (1978) 13

Treatises:

Gatley on Libel and Slander (6th ed. 1967) 16

PAGE

J. Townshend, *A Treatise on the Laws Called Libel and Slander and on the Remedy by Civil Actions for Those Wrongs* (4th ed. 1890) 17

4 *Weinstein's Evidence* (1979) 18

4 J. Wigmore, *Evidence* (Chadbourn rev. 1972 & supp. 1980) 17n

5 J. Wigmore, *Evidence* (Chadbourn rev. 1974) 17

Other Authorities:

29 Am.Jur.2d *Evidence* (1967 & supp. 1979) 18n

Annotations

31 A.L.R. 270 (1924) 17n
57 A.L.R. 504 (1928) 17n
80 A.L.R. 1145 (1932) 17n
130 A.L.R. 690 (1941) 17n
18 A.L.R.2d 1287 (1951) 18n

Fed. R. Evid. 803(22) 21

Judicial Code, 28 U.S.C. § 1257 (1976) 2, 21, 24n

W.F. McCaleb, THE AARON BURR CONSPIRACY 299 (1966) 12n

Restatement (Second) of Torts (1977) 13-14

A.R. St. John, FINAL VERDICT 455 (1962) 13n

R. Sullivan, GOODBYE LIZZIE BORDEN 205 (1974) 13n

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Opinions Below

The journal entry and opinion of the Court of Common Pleas, Lake County, Ohio, granting the motion of defendants (now petitioners) to dismiss at the close of plaintiff's case, is unreported and is set forth in the appendix at pp. 1a-2a. The judgment entry and opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake reversing the determination of the Court of Common Pleas are unreported and are set forth in the appendix at pp. 3a-19a. The orders of the Supreme Court of Ohio dismissing defendants' appeal, overruling a motion for certification and denying rehearing with respect thereto are unreported and are set forth in the appendix at pp. 22a-25a.

Jurisdiction

This libel case commenced by plaintiff Michael Milkovich ("Milkovich") was tried to a jury commencing on April 10, 1978. After five days of trial and at the close of Milkovich's evidence, the motion of defendants for a directed verdict was granted (A. 1a-2a).* On appeal to the Court of Appeals of Ohio, Eleventh District, County of Lake, the decision was reversed by opinion dated December 3, 1979 (A. 5a-19a). An appeal as of right to the Ohio Supreme Court was dismissed on March 20, 1980 and a motion for certification overruled simultaneously (A. 22a-24a). Rehearing from the dismissal of the appeal and the overruling of the motion was denied on April 25, 1980 (A. 25a). Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

Constitutional Provisions

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

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* References to "A. ....." are to the appropriate pages of the appendix to this petition.

Statement of the Case

This libel case arises out of the publication on January 8, 1975 by The News-Herald,* a newspaper with principal offices in Willoughby, Ohio, of a sports column written by journalist Ted Diadiun ("Diadiun"). The column commented on and expressed Diadiun's opinion regarding activities of Milkovich in his capacity as the wrestling coach of the Maple Heights High School team and later testimony of Milkovich with respect thereto.

Milkovich is concededly—unabashedly, in fact—one of the nation's outstanding coaches and a national sports figure. His coaching record is unparalleled throughout the nation. He advertises himself and his sons (in a brochure admitted into evidence) as "The Nation's Outstanding Wrestling Family" (T. 641-42; 729-30).** He was held in this litigation to be a public figure within the meaning of *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) (A. 20a-21a) and did not appeal from that determination, nor, at any relevant time to this date quarrel with it.***

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* The Lorain Journal Company owns and publishes The News-Herald.

** References to "T. ....." are to appropriate pages of the transcript of the trial.

*** Milkovich has been inducted into the National Hall of Fame (T. 649) and the Ohio Coaches Hall of Fame (T. 649). He has been honored with citations in the Congressional Record (T. 588) and from both the Ohio House of Representatives (T. 651) and the Ohio Senate (T. 651). He has received the National Coach of the Year Award (T. 651-52), the United States Wrestling Federation Award (T. 588) and the Kent State University Hall of Fame Award (T. 588) and numerous other awards and honors. He was a national public speaker (T. 630, 632) and has conducted wrestling clinics throughout the country (T. 644, 646, 647). When questioned at the trial, Milkovich acknowledged that he knew of no other coach in the United States who approached his record (T. 641).

On February 9, 1974, a high school wrestling match was held between the teams of Maple Heights High School (coached by Milkovich) and Mentor High School (A. 7a). When a Maple Heights wrestler fouled his Mentor opponent, who claimed to be unable to continue, the referee awarded the match to Mentor (T. 176, 597-601). A riot then ensued in the Maple Heights gymnasium; spectators ran onto the gymnasium floor from the stands; a wrestler from the Maple Heights team attacked another from Mentor; a melee followed at the end of which several wrestlers were taken to the hospital for treatment of injuries suffered (A. 7a; T. 28, 98, 179, 192).

Diadiun attended the match and wrote articles about the riot criticizing Milkovich's conduct and that of the entire Maple Heights Coaching staff (A. 7a; T. 35-37). Subsequently, a public administrative hearing was held by the Board of Control of the Ohio High School Athletic Association ("OHSAA") regarding, *inter alia,* Milkovich's conduct at the wrestling match (A. 7a-8a). Diadiun attended that hearing, as a result of which Milkovich was severely censured for his conduct at the meet and during the ensuing riot (A. 7a; T. 99-101); the entire Maple Heights team was placed on probation for the 1975-76 school year (T. 131), and the team declared ineligible to compete in the state wrestling tournament (A. 7a; T. 99). The OHSAA twice reviewed requests by Milkovich, his team and other interested parties to lessen the penalties imposed. The Board refused to modify its prior ruling (T. 133).

A suit was then filed on behalf of a group of parents and high school wrestlers claiming that due process had not been afforded in the earlier hearing (A. 7a). Diadiun did not attend the hearing held by the Franklin County Common Pleas Court in that case (A. 8a). It was, however, described to him by Dr. Harold Meyer, Commissioner

of the Ohio High School Athletic Association (T. 50-56, 108-110; *see* A. 9a).

On January 7, 1975, the Common Pleas Court held that due process had not been afforded Milkovich and the wrestlers (A. 8a). On January 8, 1975, The News-Herald published Diadiun's column at issue in this litigation (A. 8a).* Under the heading "Maple beat the law with the 'big lie' ", the column offered, in its entirety, the following views:

> "Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.
>
> "It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.
>
> "But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.
>
> "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned

* A copy of the column is set forth in the appendix at page 26a.

from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique poisition of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrences is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

The Trial

On April 30, 1975, the libel complaint in this action was filed. Defendants answered and asserted that the article was privileged under the United States Constitution, that it was published with neither knowing falsity nor reckless disregard for its truth and that it was true (Defendants' Second Amended Answer). After pretrial proceedings were concluded, defendants moved for summary judgment (*see* A. 20a-21a). On May 23, 1977, the trial court held Milkovich to be a public figure, but denied the motion for summary judgment (A. 20a-21a). The action proceeded to trial by jury. After five days of trial and at the close of all of Milkovich's evidence, defendants moved for a directed verdict on the ground that Milkovich had failed to meet his burden, as a public figure, of proffering sufficient evidence from which the jury could conclude

that Diadiun's column had been published with reckless disregard of the truth (A. 6a; T. 735-758). After extended argument, the motion was granted, the Court ruling that:

> "The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury." (A. 1a-2a)

The Decision of the Court of Appeals

Milkovich appealed to the Court of Appeals, Eleventh District, Lake County, which reversed. Its opinion relied entirely on the supposedly binding effect on the defendants in this libel case of the due process determination of the Common Pleas Court. As phrased by the Court:

> "In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differred from that of the Court, no question of libel would be before us now. *It would appear that, though*

the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person." (Emphasis added) (A. 12a)

The Court then concluded that because the decision in the Milkovich due process case was contrary to views expressed by Diadiun in his column and was known to Diadiun, and since Diadiun had not attended the due process trial nor read the transcript of it, a jury question had been raised as to whether "the reporter and his newspaper acted with reckless disregard of truth" (A. 13a).

Thus, the effect of the decision is that the directed verdict entered in favor of the defendants has been reversed; the Milkovich libel trial is to proceed to be retried; but at the trial, the court is (a) not to permit the defense that the January 8, 1975 column was protected opinion (since even opinion, when contrary to that of a court, is deemed not to be the "truth"); (b) not to require plaintiffs to prove the falsity of the column and not even to permit the defense of truth (since the "truth", the Court held, had already been judicially established); and (c) not to entertain motions to determine, as a matter of law, that plaintiff cannot meet his burden of proving that the column was published with actual malice. The trial, the Court held, may focus on whether the statements now held to be "false" had been published with reckless disregard of truth

—but not on whether the statements were protected opinion or protected because they were true (A. 12a-13a). Judge Cook dissented, based on the demonstrated evidence that what Diadiun had written was opinion which he believed to be true (A. 16a-18a).

The Ohio Appeal and the Motion for Certification

Petitioners then sought review, by way of appeal as of right and by motion to certify the record, from the Ohio Supreme Court.* They urged upon that Court that the material in question was protected opinion and hence not subject to potential liability in a libel case (Appellants' Opening Brief to the Supreme Court of Ohio, Proposition of Law No. 5). They also urged that it was erroneous, and "a Constitutional issue of the first rank", for the appeals court decision to have held the due process determination to be "unassailable" (*id.* at 16-17).

The Ohio Supreme Court dismissed the appeal, concluding that "no substantial constitutional question exists herein" (A. 22a). The motion for certification was simultaneously overruled (A. 24a). Rehearing in the Ohio Supreme Court was denied on April 25, 1980 (A. 25a).

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* An appeal as of right was guaranteed in this case by virtue of Article IV, § 2(B)(2) of the Ohio Constitution which provides for such appeals in cases involving constitutional questions. The motion to certify the record is, under Ohio law, in the nature of a petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Determinations of the Ohio Courts Are Inconsistent With the Absolute Protection Afforded by the First Amendment With Respect to the Expression of Opinion and of Truthful Facts.

Throughout the years, this Court has made plain that, in an otherwise generally non-absolutist legal context, two principles of libel law are indeed absolute: one is that the expression of opinion is absolutely protected; the other is that the expression of truth is absolutely protected. The decision from which certiorari is sought rejects both those principles in favor of a third: as phrased by the Ohio Court of Appeals, it is that "any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person" (A. 12a).

If the Ohio Court were correct, no newspaper could accuse what it believed to be a wrongfully vindicated or acquitted person of a lie, not to say a crime, and defend a libel case on grounds of either opinion or truth, notwithstanding the fact that American and English common law have always permitted such a defense in just such circumstances. Whoever the subject of the article was and whatever the circumstances,* the result would be the same:

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* *See, e.g.*, W.F. McCaleb, THE AARON BURR CONSPIRACY 299 (1966) (concluding of Aaron Burr and his supporters' acquittals of high misdemeanors, that "[t]here seems to be not the slightest

in a libel case brought by any such person, the newspaper would be stripped of its constitutionally-guaranteed defenses. Moreover, if the lower court opinion were correct, no newspaper could safely voice any supposedly defamatory opinion about the conduct of a public figure in situations in which a court had expressly or inferentially rendered a favorable determination about that conduct.* Such is not the law and, as we demonstrate, it has never been the law. Yet it will remain the law in Ohio unless and until this Court determines to hear and adjudge the merits of this case.

The distinction between statements of opinion and those of fact is often not easy to make. *See generally* Schauer, *Language, Truth and the First Amendment,* 64 Va.L.Rev. 263 (1978). Yet the column at issue here appears to fall comfortably within the realm of pure opinion—*e.g.*, an expression in which "the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Restatement (Second) of Torts* § 566, comment b (1977). In form, the column is a signed editorial; in substance, all the facts which support the

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doubt that Aaron Burr and his followers were all guilty"); R. Sullivan, GOODBYE LIZZIE BORDEN 205 (1974) (concluding that Lizzie Borden, acquitted of murdering her parents, "had, in the most barbarous manner, savagely butchered her elderly father and her docile stepmother"); A.R. St. John, FINAL VERDICT 455 (1962) (concluding that Clarence Darrow, acquitted of jury bribery, was "guilty as hell").

* We use the word "inferentially" advisedly in the context of the instant case since, as the opinion of the Court of Appeals suggests (A. 7a), the supposed vindication of Milkovich was, in fact, little more than a determination that he had been denied due process of law. For purposes of this appeal, however, we accept the lower Court's characterization of the determination of the results of the due process decision relating to Milkovich (*see* A. 12a).

opinion that Milkovich lied are set forth in the column. In such circumstances, it is plain that even if the opinion is deemed defamatory, it cannot be actionable since it does not "impl[y] the allegation of undisclosed defamatory facts as the basis for the opinion." *Restatement (Second) of Torts* § 566, *supra.* In fact, in numerous cases in which people have been accused of lying, it has been held that that expression was one of opinion and not of fact. *See, e.g., NLRB* v. *B. D. Holt Co.,* 516 F.2d 505, 507 (5th Cir. 1975) (statement by union that company president "is a liar" held to be opinion); *Smith* v. *Levitt,* 227 F.2d 855, 857 (9th Cir. 1955) (characterization of views of plaintiff as "an obvious concoction, a lie from the whole cloth" held opinion); *Hoag* v. *Charlotte Republican-Tribune,* 5 Med. L. Rptr. 1535, 1540 (Mich. Cir. Ct. 1979) (statement that individual had been convicted of crime "based on testimony and physical evidence supplied by Hoag that later turned out to be false" held opinion); *Craig* v. *Moore,* 4 Med. L. Rptr. 1402, 1403 (Fla. Cir. Ct. 1978) (characterization of mayor as a "deceptive individual who quite often misleads, if not blatantly lies to reporters from this radio station" held opinion). *And see Edwards* v. *National Audubon Society, Inc.,* 556 F.2d 113, 121-22 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977) (characterization of scientists as "liars" held opinion although characterization of scientists as "paid liars" considered one of fact).

If, as we suggest, the characterization of Milkovich as having lied is one of opinion, it is plain that the decision below is inconsistent with the rule of law established in prior rulings of this Court. Opinion, this Court has held, is absolutely protected. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974); *Old Dominion Branch No. 496, National Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264, 284 (1974).

Indeed, even if the column were deemed one of fact, the ruling would be equally inconsistent with governing law, since this Court has made clear that true statements of fact are also absolutely protected. *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 340-41; *Time, Inc.* v. *Firestone,* 424 U.S. 448, 458 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 490 (1975); *id.* at 497-500 (Powell, J., concurring); *Garrison* v. *Louisiana,* 379 U.S. 64, 72-73 (1964).

For the Ohio courts to construct an exception to these holdings in situations in which an expression is contrary to that reached by a court is, in the first instance, flatly contrary to the approach taken in a host of cases decided by this court emphasizing the freedom—and harshness—with which our courts may, with impunity, be criticized. Our society protects speakers from charges of criminal libel who go so far as to raise "interesting questions about the racketeer influences on our eight vacation-minded judges", *Garrison* v. *Louisiana, supra,* 379 U.S. at 66, and requires that truth be a defense in such circumstances. *Id.* at 72-73.* Newspapers are protected from findings of contempt when they criticize a court for committing a "travesty on justice" and for concluding that a losing party "seem[ed] to be getting a raw deal" and for urging that one-sided justice had been done, *Craig* v. *Harney,* 331 U.S. 367, 369-70 (1947). Judges may be accused of "outrageous" decisions, *Bridges* v. *California,* 314 U.S. 252, 276 (1941); of being guilty of "deplorable examples of race agitation" and speaking "in the style and language of a race baiting candidate", *Wood* v. *Georgia,* 370 U.S. 375, 379-80 (1962); and of seeking "every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify

* In *Garrison,* the Court did not determine whether the statements at issue were "factual or merely comment" (379 U.S. at 76 n.10).

prosecution," *Pennekamp* v. *Florida,* 328 U.S. 331, 339 (1946). All these are protected statements, even as arrayed against the serious societal interests set forth by dissenting members of the Court.* Yet the courts of Ohio have held that the far less inflammatory language present in this case may not even be defended, even on the basis of truth.

Nor is there any paucity of authority with respect to the protection that has historically been afforded to speakers or writers in defending libel actions (whether on the basis of opinion or truth) brought by successful litigants in earlier cases. At English common law, it has long been clear that "[t]he fact that the plaintiff has been acquitted of an offence does not preclude the [libel] defendant from setting up a plea of justification." *Gatley on Libel and Slander* § 1315 (6th ed. 1967). Prior to the adoption of our Bill of Rights, English courts recognized that "[t]hough the principal thief had previously been acquitted of the felony, it would be competent for the defendant in [the libel] cause to go into evidence to prove his guilt; because what had passed between other parties could not affect him. . . ." *Cook* v. *Field,* 170 Eng. Rep. 564 (1788). *See also England* v. *Bourke,* 170 Eng. Rep. 545 (1799) (where defendant accused a plaintiff, acquitted of murder, of being "a thief and a murderer," the court observed "had there been [justification], notwithstanding the acquittal, I would have tried the truth of the plea"); *Helsham* v. *Blackwood,* 138 Eng. Rep. 412, 418 (1851) ("an acquittal is not conclusive or any evidence of the innocence of the party, except where it is sought to punish him again for the offence: in a civil suit it is res inter alio").

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* *See, e.g., Wood* v. *Georgia, supra,* 370 U.S. at 396 (Harlan, J., joined by Clark, J., dissenting); *Craig* v. *Harney, supra,* 331 U.S. at 394 (Frankfurter J., joined by Vinson, C.J., dissenting); *id.* at 394 (Jackson, J., dissenting); *Bridges* v. *California, supra,* 314 U.S. at 279 (Frankfurter, J., joined by Stone, C.J., Roberts, J., and Byrnes, J., dissenting).

Illustrative of such cases is *Risk Allah Bey* v. *Whitehurst*, 18 L.T.R. 615 (1868), in which the court observed in a situation where a journalist had written of an individual acquitted in a murder trial that "a prisoner [who was] less clever and less prosperous . . . would on the same evidence have been convicted" (*id.* at 619), that

> "I quite agree that if, by some oversight or want of firmness on the part of the judge or jury, a great criminal escapes, and, by a miscarriage of justice, a scandal is brought on its administration and the criminal is let loose on society, rehabilitated and let loose when he ought to be suffering punishment—in such a case a public writer would be doing no more than his duty in coming forward to remonstrate with the tribunal through whose want of firmness the man has been acquitted. If that is done through that fair and reasonable exercise of judgment which the case demands, no jury ought to visit a public writer with damages because he has fairly and conscientiously discharged a public duty." *Id.* at 620.

The American rule has been precisely the same. *See generally* J. Townshend, *A Treatise on the Wrongs Called Slander and Libel and on the Remedy by Civil Action for Those Wrongs* § 354 (4th ed. 1890). In fact, under American common law, the general practice has been to exclude *all* prior judgments if offered to prove the truth of the facts upon which the judgment was based. Prior judgments have been, in effect, treated as a species of hearsay. 5 J. Wigmore, *Evidence* § 1671a, at 806-07 (Chadbourn rev. 1974).*

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* For copious case citations supporting the rule barring admission of prior convictions and acquittals into evidence in a subsequent case, *see* 4 J. Wigmore § 1346a (Chadbourn rev. 1974 & supp. 1980); Annot., 31 A.L.R. 261, 270 (1924); Annot., 57 A.L.R. 504 (1928); Annot., 80 A.L.R. 1145 (1932); Annot., 130 A.L.R. 690

This Court has repeatedly held that, absent privity in the prior action, parties in a subsequent civil proceeding are not bound by a judgment on the same facts rendered in a prior criminal action.* And, while the Federal Rules of Evidence have now adopted the policy of admitting felony convictions to prove the truth of the facts upon which the judgments rest (Fed.R.Evid. 803(22)), as before, neither criminal judgments of acquittal, nor prior civil judgments of any sort are so admissible. *See* 4 *Weinstein's Evidence* ¶ 803(22) [01] at 803-280 (1979).

Several venerable American cases have dealt directly with the issue of admitting prior acquittals into evidence

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(1941); 18 A.L.R. 2d 1287 (1951). *See also* Note, *Judgments As Evidence*, 46 Iowa L. Rev. 400 (1961); Note, 1962 Duke L.J. 97; Note, 35 Cornell L.Q. 872 (1950); Comment, *Evidence: Judgments: Res adjudicata: Admissibility of criminal judgment in a subsequent civil action*, 17 Cornell L.Q. 493 (1932); 29 Am.Jur. 2d *Evidence* § 335 (1967 & supp. 1979).

* *See Coffey* v. *United States*, 116 U.S. 436, 443 (1886) (a defendant's acquittal in a prior criminal prosecution is inadmissible in a subsequent civil action by a private plaintiff "for the reason that the parties are not the same"); *Stone* v. *United States*, 167 U.S. 178, 183-89 (1897) (defendant's acquittal in prior criminal action held inadmissible in subsequent civil action even where same parties were involved); *Murphy* v. *United States*, 272 U.S. 630 (1926) (despite acquittal on charges of maintaining a nuisance brought under the National Prohibition Act, the United States may sue to enjoin the same alleged nuisance under the civil provision of the Act); *Helvering* v. *Mitchell*, 303 U.S. 391 (1938) (where defendant's acquittal on a charge of willful attempt to evade tax held not a bar to assessment and collection of deficiency and surcharge thereon); *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950) (acquittal on charges of criminal conspiracy to violate § 3 of the Sherman Act not *res judicata* in subsequent civil action brought to enjoin defendants from price-fixing); *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972) (where owner of emerald stones and ring intervened to bar forfeiture action with his previous acquittal on smuggling charges; *held*, forfeiture action not barred because criminal acquittal not a determination that property was not unlawfully imported).

in subsequent civil libel actions. Consistent with the case law cited above, such acquittals have not even been held admissible, let alone binding.* Typical is *Corbley* v. *Wilson*, 71 Ill. 209 (1874). In that case, a slander plaintiff had been acquitted on charges of committing "a crime the most abhorrent to nature. . . ." *Id.* at 210. Following plaintiff's acquittal, the defendant again accused the plaintiff of having committed the crime. At the trial for slander, the plaintiff successfully introduced the record of his prior acquittal. This was held to be error by the Supreme Court of Illinois, because the slander defendant had not been a party to the first criminal proceeding. The Court was emphatic about the defendant's right to prove the truth of his allegations notwithstanding plaintiff's acquittal.

> "If the words were true, and of their truth the defendant had assumed the responsibility of establishing, which he had a clear right to do nothwithstanding the verdict of acquittal, the verdict and judgment had no place in the cause, for any purpose. If the charge was true, the defendant had a right to make it, and to stand by it, and it was no evidence of malice that he did make it, because a jury had acquitted him. The time may come when it will be for the best interests of the republic to make a public demonstration of the falsity of a verdict in a given case." 71 Ill. at 212.

Accord: Bilgrien v. *Ulrich*, 150 Wis. 532, 137 N.W. 759 (1912) (plaintiff's prior acquittal held inadmissible in slander action involving charge that plaintiff had, in fact, been guilty because defendant was not privy to the prior criminal

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* The only exception of which we are aware is *Rosenbloom* v. *Metromedia, Inc.*, 289 F.Supp. 737 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971). In *Rosenbloom*, however, the Court held that since evidence of the plaintiff's trial for obscenity had been introduced, so should the fact of his acquittal.

proceeding). *See also Fritchette* v. *Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828 (1928) (judgment in prior action where third parties had successfully recovered against plaintiffs for bad-faith business dealings inadmissible in libel action involving charge of same conduct); *Henderson* v. *Fox*, 80 Ga. 479, 6 S.E. 164 (1888) (judgment for plaintiff in prior action between identical parties wherein defendant had sought to recover embezzled funds was not a bar in slander action to defendant's proving truth of his subsequent accusation of embezzlement).

The error of the Ohio courts in affording conclusive weight to the determination in the *Milkovich* due process hearing is thus not only unprecedented but flatly contrary to long established constitutional commands. It is inconsistent with the clear holdings of this Court affording absolute constitutional protection to the expression of both opinion and of truthful speech; it is inconsistent with the case law permitting—and even encouraging—vigorous and uninhibited criticism and of disagreement with judicial rulings; it is at odds with centuries of rulings of both English and American courts.

And it is, as well, wholly inconsistent with the underlying principles of *New York Times* v. *Sullivan* itself. At the core of the *Sullivan* ruling, as this Court has frequently reiterated through the years, is the proposition that only the publication of knowing falsehoods or falsehoods published with reckless disregard of the truth are actionable. Reckless disregard, this Court has held, may only be proved by demonstrating that the defendants "entertained serious doubts as to the truth" of the publication, *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), or published with a "high degree of awareness of their probable falsity," *Garrison* v. *Louisiana, supra*, 379 U.S. at 74. *See generally, Herbert* v. *Lando*, 441 U.S. 153 (1979).

Yet in the instant case, reversal of the directed verdict was accomplished by affording irrebuttable and, in fact, conclusive weight to the judicial determination in the *Milkovich* due process decision—thus obviating the need to demonstrate "falsity" at all. Far from requiring Milkovich to prove the falsity of the statements at issue,* the Ohio courts have held that defendants may not even defend on grounds of truth. Nothing in the *Sullivan* ruling permits such a short-cutting of its protections.**

II.

The Decision of the Supreme Court of Ohio is a Final Judgment and in All Respects Ripe for Review.

The decision of the Supreme Court of Ohio dismissing the appeal for lack of a "substantial constitutional question" and, in effect, affirming the decision of the Court of Appeals is a final judgment for purposes of 28 U.S.C. § 1257 (1976).*** *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469

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* *Herbert* v. *Lando,* 441 U.S. 153, 156-57 (1979); *St. Amant* v. *Thompson,* 390 U.S. 727, 731-33 (1968); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

** The treatment by the Ohio courts of the requirement of demonstrating subjective awareness on the part of the defendants of probable falsity of the January 8, 1975 column is similar. A jury is now, *inter alia,* to adjudge the "reliability" of Dr. Harold Meyers—Commissioner of OHSAA—as a source of Diadiun's information about the due process hearing (A. 14a-15a). The relevant question, of course, is quite different in any case governed by *Sullivan.* It is not the "reliability" or credibility of a source as now adjudged by a jury; it is whether the reporter seriously doubted the source at the time he wrote his story. *St. Amant* v. *Thompson, supra.*

*** The writ of certiorari is being sought from the judgment of the Supreme Court of Ohio as dictated by decisions of this Court which hold that where, as here, an appeal as of right is taken to the state's court of last resort and the appeal is dismissed for lack of a substantial constitutional question, that judgment of dismissal

(1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). This Court has made clear that the finality requirement must be given a "practical" and "pragmatic" construction (*see, e.g., Cox Broadcasting Corp.* v. *Cohn, supra*, 420 U.S. at 486; *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)) and that in so doing, this Court looks "to the whole record" in assessing whether the requirement is satisfied. *Local 438, Construction Laborers* v. *Curry*, 371 U.S. 542, 551 (1963). An examination of the record here in light of the factors enunciated in *Cox* clearly demonstrates that this case is presently ripe for review.

In *Cox* this Court recognized that where, as here, final determination of a federal question had been made by the state court, but further proceedings in the state court might "obviate later review of the federal issue" (420 U.S. at 486 n.13), review is appropriate

> "if a refusal immediately to review the state-court decision might seriously erode federal policy. . . ." (420 U.S. at 483)

Here, as in *Cox*, the federal policy threatened by the state court determination is that of freedom of the press. Here, as there, state appellate review of the federal question has led to a remand for a state trial despite objections that the First Amendment precludes such a course. Here, as there, immediate review is the "best way to avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 479 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326

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is the "final judgment" for purposes of 28 U.S.C. § 1257. *See, e.g., Titus* v. *Wallick*, 306 U.S. 282 (1939); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Huwe*, 269 U.S. 262, 263-65 (1925).

U.S. 120, 124 (1945)). Indeed here, as there, immediate review could well put an end to the litigation.

It is true that petitioners could possibly prevail at the subsequent trial.* Yet again, the same situation was presented in *Cox*. Nonetheless, there the Court stated:

> "[E]ven if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.'" *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 485-86 (citing *Miami Herald Publishing Co.* v. *Tornillo, supra,* 418 U.S. at 247 n.6).

This case presents none of the dangers of premature intrusion in state court proceedings. The Ohio courts have spoken finally and clearly.** Expressions of opinion and

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* Since defendants have been stripped of the constitutional protections accorded opinion and truth, they could only prevail at a subsequent trial on the ground that the "false" article was not published with reckless disregard for its truth or with knowing falsity. Exactly how defendants are to be permitted to do this is unclear from the Court of Appeals' decision. As such, this case may "once more wind its weary way back" to this Court. *Mills* v. *Alabama,* 384 U.S. 214, 217 (1966).

** All of the issues raised in this petition were urged, as well, before the Supreme Court of Ohio. By constitutional mandate, that court was required to review the merits of petitioners' claims.

(Footnote continued on following page)

truthful statements of fact by a newspaper are not to be accorded the protections of the First Amendment if they conflict with prior judicial determinations in cases in which the newspaper was not a party. Such a rule of law is, as we have demonstrated, totally at odds with long-established constitutional commands. The inhibiting effect of such a rule of law—its invitation to timidity and excess caution—is already real. As in *Cox,* the press (and other speakers) are already "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt . . . ." *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 486. The decision of the Supreme Court of Ohio is final and the Court has jurisdiction to review it.

Ohio Const. Art. IV, §2(B)(2). *Compare National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43 (1977), where the Supreme Court of Illinois had, in its discretion, failed to remedy the deprivation of First Amendment rights at issue there. Nonetheless, because of the serious ramifications of the state court's failure to act, this Court accepted review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Supreme Court of the State of Ohio.

Respectfully submitted,

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Dated: July 23, 1980

APPENDIX

APPENDIX CONTENTS

PAGE

Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict 1a

Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake 3a

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake 5a

Judgment Entry Errata 19a

Judgment Entry in the Court of Common Pleas, Lake County, Ohio Granting In Part and Denying In Part Defendants' Motion for Summary Judgment 20a

Order of the Supreme Court of Ohio Dismissing the Appeal 22a

Order of the Supreme Court of Ohio Overruling the Motion for an Order Directing the Court of Appeals to Certify Its Record 24a

Order of the Supreme Court of Ohio Denying Rehearing 25a

The Article In Issue 26a

Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict

Court adjourned to Monday 5/1/1978, Court not pursuant to adjournment. Present and presiding, John F. Clair, Jr., Judge, John M. Parks, Judge, Ross D. Avellone, Judge.

IN THE

COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

Case No. 75 Civ 0301

JUDGE JOHN CLAIR

JOURNAL ENTRY

MICHAEL MILKOVICH, SR.,

Plaintiff,

VS.

THE NEWS-HERALD, *et al.*,

Defendants.

The Court, coming on to consider the Motion of the Defendants for a directed verdict in favor of the Defendants, which Motion was made at the close of the Plaintiff's evidence in the fifth day of trial, and upon consideration of the arguments of counsel, the Court finds that the Motion is well taken and that the said Motion should be and hereby is granted.

The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed most

Journal Entry of the Court of Common Pleas, Lake County, Ohio, Granting Defendants' Motion for a Directed Verdict

strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

/s/ JOHN F. CLAIR, J.
Judge John F. Clair

Approved:

/s/ NATHAN SIMON
Attorney for Plaintiff

/s/ DAVID L. HERZER
Attorney for Defendants

[*Filed: May 1, 1978*]

Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake

IN THE

COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

Case No. 6-287

STATE OF OHIO,
COUNTY OF , *ss.*:

MICHAEL MILKOVICH,

Appellant,

VS

THE LORAIN JOURNAL COMPANY, ET AL.,

Appellees.

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and cause remanded for further proceedings. Cook, J., dissents. See Dissenting Opinion.

Judgment Entry of the Court of Appeals of Ohio, Eleventh District, County of Lake

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge Edwin T. Hofstetter
FOR THE COURT

(Connors, J., of the 6th Appellate District, sitting for Dahling, P.J.)

COOK, *J.*, Dissents

(See Dissenting Opinion)

[*Filed: December 3, 1979*]

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

COURT OF APPEALS OF OHIO

ELEVENTH DISTRICT

COUNTY OF LAKE

COURT OF APPEALS CASE NO. 6-287

MICHAEL MILKOVICH,

Plaintiff-Appellant,

—VS—

THE LORAIN JOURNAL COMPANY, ET AL.,

Defendant-Appellees.

OPINION

DATED: December 3, 1979

JUDGES:

HON. EDWIN T. HOFSTETTER, *J.*; HON. ROBERT E. COOK, *J.*; HON. JOHN J. CONNORS, JR., *J.*, Sixth District, by Assignment, for HON. ALFRED E. DAHLING, *P.J.*

APPEARANCES:

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Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

HOFSTETTER, J.

The matter on appeal came on for trial before a jury. After the plaintiff-appellant rested his case, the defendants jointly moved the Court for a directed verdict in their favor on the ground that there is no justiciable issue for the jury, and that reasonable minds can come but to one conclusion, to-wit, that the proof fails to evidence by clear and convincing proof that the article which is the subject of this action was published with knowledge of its falsity or with reckless disregard as to its truth.

The trial court granted the motion in favor of the defendants, as follows:

> The Court finds that reasonable minds can come to but one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

It is from this judgment, granting a directed verdict for the defendants, that plaintiff has appealed.

As background, the complaint in the court below was an action in libel filed by the plaintiff-appellant, Michael Milkovich, against the defendants, The Lorain Journal Publishing Company, owner and publisher of the Willoughby News-Herald, and Mr. Theodore Diadiun, as the result of the publication of a certain article on January 8, 1975. The article in question was stipulated at trial and admitted into evidence as plaintiff's Exhibit "D." (T.p. 12.)

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

The events which led to the eventual publication of this alleged libelous article began on the evening of February 9, 1974, at a routine high school wrestling match between Mentor High School and Maple Heights High School. The latter team was coached by the now-retired Michael Milkovich, appellant herein. It appears that, during and shortly after a wrestling match between Bob Girardi of Maple Heights and Paul Pochatilla of Mentor High School, a melee broke out among the fans and spectators in the crowd, and among the wrestling participants themselves. One of the defendants, Ted Diadiun, a sportswriter for The News-Herald, wrote a series of articles following the occurrence.

Following the altercation, a series of hearings were conducted by the Ohio High School Athletic Association (OHSAA) in Columbus, Ohio, following which the Maple team was totally suspended from state competition, and the appellant, Michael Milkovich, was censured.

It was at this time that a group of parents and wrestlers filed suit in Franklin County Common Pleas Court in an action styled "Barret v. Ohio High School Athletic Association." It was held by that Court that the OHSAA failed to safeguard certain due process rights in suspending the team from state competition, thereby denying the team members of important property rights without due process of law.

Immediately after the announcement of Judge Martin's decision reinstating the Maple team to state competition, the defendants published the alleged libelous article which headlined, "Maple Beat The Law With The Big Lie."

Factually, therefore, it should be noted that, following the alleged melee between the Maple and Mentor wrestling

crowds, and as a result of hearings, the Ohio High School Athletic Association (OHSAA) suspended the Maple team from state competition. Defendant Diadiun attended both the wrestling meet between the two teams as well as the OHSAA hearing. The subsequent action against the OHSAA in Franklin County was brought to determine whether certain due process rights were accorded the Maple team before it was suspended from state competition. The defendant Diadiun did not attend that hearing. In the Franklin County trial had on November 8, 1974, the decision announced on January 7, 1975, as noted by the appellees in their brief, reversed the administrative action (of suspension). The reversal was on procedural grounds.

Pertinent to further discussion of defendants-appellee's publication on January 8, 1975, of the article which was headlined "Maple Beat The Law With The Big Lie" are the following statements made during the cross-examination of Diadiun:

> Q Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?
>
> A I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were (sic) whether or not—who was at fault.
>
> . . . . .
>
> Q Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A Yes.

. . . . .

Q Didn't you think it was necessary for you to read that decision (of Judge Paul Martin of the Franklin County Common Pleas Court) before you published such an article?

A Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed—

. . . . .

Q The fact of the matter is, you never took the trouble to find that decision and read it, did you?

. . . . .

A I didn't find the decision, no.

Q You didn't find it necessary to read it?

A No.

With the above as a fair predicate of the facts pertinent to our discussion of the directed verdict, the plaintiff-appellant assigned ten errors, as follows:

1. The Court erred in granting the motion of defendant-appellee for directed verdict at the close of testimony of the plaintiff;

2. The Court erred in its ruling that plaintiff failed to meet the burden of proof by clear and convincing evidence at the close of the testimony of the plaintiff, and that it was a necessary element for purposes of ruling upon a Motion For Directed Verdict;

3. The Court erred in its ruling that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";

4. The Court erred in its ruling by applying the incorrect law of Libel i.e. the Actual Malice test by omitting the proposition of law that the publisher acted with *"total disregard for truth or falsity"* and basing its findings exclusively upon the facts and law that plaintiff was severely lacking in any evidence to prove defendants published the Article with *"knowledge of its falsity"*;

5. The Court erred in failing to apply the legal standards set forth in Rule 50(A)(4), in ruling upon defendant's Motion For Directed Verdict;

6. Should the Appellate Court apply Rule 50(A)(4) to the trial proceeding and ruling in the lower court, then Appellant alleges the trial court erred in effect in its findings that:

   (a) That reasonable minds could not draw different inferences or conclusions from the evidence presented, relevant to the Actual Malice test i.e. knowledge of its falsity, and/or defendant's total disregard for truth or falsity;

   (b) That reasonable minds could come to but one conclusion, after construing the evidence most strongly in favor of the plaintiff, that there was no dispute, doubt, conflicting testimony, question, or any evidence in plaintiff's case to prove that defendant acted with Actual Malice i.e.

knowledge of its falsity, and/or total disregard for truth or falsity in publishing the alleged libelous publication.

7. The Court erred in denying appellant the right to introduce into evidence the transcript of the record of the case of Ray Barrett v. OHSAA in the Court of Common Pleas, Franklin County;

8. The Court erred in its ruling upon defendant's Motion for Directed Verdict, by failing to mention the requirement set forth in Ohio Rule 50(E); and in fact, not construing the evidence most strongly in favor of the plaintiff;

9. The Court erred in its ruling by holding in effect that there was no controversial evidence of any determinative issue for the jury to weigh and that to submit the case to the jury would permit them an opportunity to do unreasonable harm to the parties.

10. The Court erred in its ruling that the defendants acted upon a reliable source.

In the instant case we have some of the attributes of New York Times Co. v. Sullivan, 376 U. S. 254, 11 L. Ed. 2d 686. However, we have the additional element involved that the alleged lies spoken of in the news article were made after judicial ascertainment of where the truth lay as it concerned the trial in which the alleged lies were supposedly uttered.

The Sullivan case, as we understand it, stands for the proposition that a public official or person such as the plaintiff herein is prohibited from recovering damage for a

defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

All assignments except No. 7 and 10 direct themselves to the impropriety of granting the directed verdict. In furtherance of our above commentary, we hold that the trial court did err. In typical cases such as Sullivan, the libel alleged had still to be subjected to judicial process to determine whether libel existed. In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differed from that of the Court, no question of libel would be before us. It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether, in a given case, it con-

stitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

Thus, where the evidence includes the factual data that (1) a decision was rendered by a trial court in Franklin County on a related matter, (2) that the defendant Diadiun acknowledged he knew such decision was rendered in favor of the plaintiff herein and his team of wrestlers, (3) that he did not attend that trial, and (4) that he did not read the transcript of that trial, it would appear that it is a jury question as to whether the reporter and his newspaper acted with reckless disregard of the truth.

We recognize that it has long been held that a motion for directed verdict raises a question of law only. Michigan-Ohio-Indiana Coal Assn. v. Nigh, Admx., 131 Ohio St. 405. Further if the facts are undisputed, this issue is one for the Court, but, where the circumstances are such that reasonable minds might reach different conclusions as to inferences to be drawn from the undisputed evidence, there arises a question of fact for the jury: Bennett v. Sinclair Refining Co., 144 OS 139, 29 00 223, 57 NE(2d) 776; Snider v. Rollins, 102 OS 372, 131 NE 733; Slyder v. Commissioners, 133 OS 146, 10 00 214, 12 NE(2d) 407; Yackee v. Napoleon, 135 OS 344, 14 00 231, 21 NE(2d) 111; Hamden Lodge v. Ohio Fuel Gas Co., 127 OS 469, 189 NE 246.

For the reasons indicated, we find all assignments, except No. 7 and 10, at least to the extent they relate to the order granting a directed verdict for the defendants, are well taken.

Assignment No. 7, in our opinion, is without merit. The trial judge in that case was the arbiter of the facts. It was his duty to weigh and decide what was determined by the

evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the "big lie" article so as to exonerate the defendants from either "actual malice" or such reckless disregard of the truth as to constitute malice as set forth in Sullivan, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein.

Assignment No. 10, that the Court erred in its ruling that the defendants acted upon a reliable source, is well taken, although not for the reasoning expressed by the appellant. The reliability and believability of the source is for the trier of facts. Paragraphs 3 and 4 of the syllabus in O'Day v. Webb, 29 Ohio St. 2d 215, are pertinent, to wit:

> 3. A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.
>
> 4. It is the duty of a trial court to submit an essential issue to the jury when there *is* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue, or, conversely, to withhold an essential issue from the jury when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.

We think the trial court erred in considering the question of the reliability of the source of the "defamatory"

statements published when the basis for ruling on a directed verdict is not based on factual issues but on questions of law.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

/s/ (Illegible)
Judge Edwin T. Hofstetter

Cook, J., dissents (See Dissenting Opinion)

Connors, J., concurs
(Connors, J., of the 6th
Appellate District,
sitting for Dahling, P. J.)

Opinion of the Court of Appeals of Ohio, Eleventh District, County of Lake

Cook, J. (Dissenting Opinion)

I respectfully dissent from the majority opinion of the Court.

The sole question in the instant cause is whether the trial court erred in granting appellee's motion for a directed verdict at the conclusion of the appellant's evidence.

Civ.R.50, in pertinent part, states:

> "(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A review of the evidence offered by the appellant in the proceedings below indicates reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion was adverse to the party against whom the motion was directed, the appellant.

The benchmark case in the libel law in the United States is New York Times v. Sullivan, 376 U.S. 254. In the New York Times case, the United States Supreme Court stated at pages 279-280:

> "The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his

> official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments."

In Curtiss Publishing Co. v. Butts, 388 U.S. 130 the United States Supreme Court extended the First Amendment safeguards of the New York Times case to those defending libel actions brought by public figures as well as public officials. Appellant was found by the trial court to be a public figure.

Here, the newspaper article written by Ted Diadiun of the Willoughby News Herald was based on what he had personally observed at the wrestling match where the incident occurred and the testimony he had personally heard appellant give at the hearing before OHSAA and what he had supposedly learned about appellant's testimony at a judicial hearing in the Franklin County Common Pleas Court from Dr. Harold Meyer, Commissioner of the OHSAA, in a telephone conversation. Diadiun concluded appellant had lied in the Franklin County court proceedings.

The important question is whether Ted Diadiun wrote his article with "actual malice" towards appellant, as required by the New York Times case. In other words, did Diadiun write his article knowing it was false or with reckless disregard of whether it was false or not.

At the conclusion of appellant's evidence in the court below, there was no evidence before the court that Diadiun wrote the article with "actual malice" against the appellant.

Rather, the evidence indicated Diadiun wrote the article based on his personal observations as to what occurred at the wrestling match and what appellant testified to at the OHSAA hearing in addition to what Dr. Meyer had indicated to him about appellant's testimony in court. Based on these sources of information, Diadiun expressed his opinion as to the statements of appellant in the Franklin County court proceedings. Appellant believed his article to be true.

I am of the opinion the article written by Diadiun falls within the limits of the court's words at page 269 of the New York Times case:

> "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion."

I would affirm the judgment of the trial court.

/s/ Robert E. Cook
Robert E. Cook, J.

[*Filed: December 3, 1979*]

Judgment Entry Errata

IN THE

COURT OF APPEALS

ELEVENTH DISTRICT

Case No. 6-287

JUDGMENT ENTRY ERRATA

STATE OF OHIO,
LAKE COUNTY, *ss.*

MICHAEL MILKOVICH,

Appellant,

— VS —

LORAIN JOURNAL CO., ET AL.,

Appellees.

It coming to the attention of this Court that an error exists on Page 3, Line 2 of the Dissenting Opinion of Judge Robert E. Cook, dated December 3, 1979, this Court sua sponte orders the Clerk of the Court of Lake County to strike the word "appellant" at said place in said Dissenting Opinion and, by pen, insert the word "appellee".

/s/ ROBERT E. COOK
JUDGE ROBERT E. COOK
FOR THE COURT

[*Filed: December 21, 1979*]

Judgment Entry in the Court of Common Pleas, Lake County, Ohio, Granting in Part and Denying in Part Defendants' Motion for Summary Judgment

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

No. 75 CIV 0301

MICHAEL MILKOVICH, SR.,

Plaintiff,

vs.

THE NEWS HERALD, et al.,

Defendants.

JUDGMENT ENTRY

May 23, 1977

This day this cause came on to be heard on the motion of the defendant for summary judgment, briefs of the parties, depositions and affidavits furnished by both parties.

Upon consideration the Court finds said motion well taken in part and not well taken in part.

First, the defendant seeks a finding that the plaintiff is a public figure within the meaning of *Curtis* v. *Butts,* 388 U.S. 130. The Court is of the opinion that it has been clearly shown that the plaintiff is indeed a public figure.

The defendant also seeks an order finding that there was no knowledge of falsity or reckless disregard of truth in this case. The Court finds the evidence to be conflicting and therefore not the subject for summary judgment.

Judgment Entry in the Court of Common Pleas, Lake County, Ohio, Granting in Part and Denying in Part Defendants' Motion for Summary Judgment

IT IS THEREFORE ORDERED that the request for summary judgment be granted to the defendant on the one issue of the public figure.

/s/ JOHN F. CLAIR, JR.
John F. Clair, Jr.
Judge of the Court of Common Pleas

Copies;

Nathan Simon, Esq.
Michael J. Occhionero, Esq.
William G. Wickens, Esq.
John J. Hurley, Jr., Esq.

Order of the Supreme Court of Ohio Dismissing the Appeal

THE SUPREME COURT OF OHIO

1980 TERM

To wit: March 20, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

APPEAL FROM THE COURT OF APPEALS
for LAKE County

This cause, here on appeal as of right from the Court of Appeals for LAKE County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for LAKE County for entry.

Order of the Supreme Court of Ohio
Dismissing the Appeal

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 15th day of July 1980

THOMAS L. STARTZMAN Clerk

/s/ SAM F. ADKINS Deputy

[Seal]

Order of the Supreme Court of Ohio Overruling the Motion for an Order Directing the Court of Appeals to Certify Its Record

THE SUPREME COURT OF OHIO

1980 TERM

To wit: March 20, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

THE LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for LAKE County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Wiskinas, Herzer and Panza.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 15th day of July 1980
THOMAS L. STARTZMAN Clerk
/s/ SAM F. ADKINS Deputy

[Seal]

Order of the Supreme Court of Ohio Denying Rehearing

THE SUPREME COURT OF THE STATE OF OHIO

1980 TERM

To wit: April 25, 1980

THE STATE OF OHIO,
City of Columbus.

No. 80-107

MICHAEL MILKOVICH,

Appellee,

vs.

LORAIN JOURNAL COMPANY, ET AL.,

Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of July 1980.

THOMAS L. STARTZMAN, Clerk.

by /s/ SAM F. ADKINS Deputy.

[Seal]

The Article In Issue

The News Herald

January 8, 1975

at 35, 39

(see opposite) ☞

Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

TD Says

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 39

Milkovich takes aim at Columbus

COLUMBUS, Ohio (AP) — Maple Heights wrestling Coach Mike Milkovich says his team will be shooting for an unprecedented 11th state wrestling title following a judge's ruling yesterday allowing the team to compete.

Judge Paul Martin granted the high school a temporary injunction. The injunction stops the Ohio High School Athletic Association from enforcing a suspension against the team.

"We're all happy at Maple Heights," the coach said.

... Diadiun says Maple told a lie

(Continued from Page 35)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurances is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the si[illegible] board members were able to see through it.

28a

tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Comm.on Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the StateHigh School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governor body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSAA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself

suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

Supreme Court, U. S.
FILED
SEP 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-100

In the Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS HERALD, and J. THEODORE DIADIUN,
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Statement of the Case 1

The Trial 3

The Decision of the Court of Appeals 3

Reasons for Denial of the Writ of Certiorari 4

Conclusion 8

TABLE OF AUTHORITIES

Cases

Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976), *cert. denied* 429 U.S. 1062 (1977) 5

Curtis Publishing Co. v. Butts, 388 U.S. 130, *rehearing denied* 389 U.S. 889 (1967) 7

Garrison v. Louisiana, 379 U.S. 64 (1964) 7

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Mashburn v. Collin, 355 So.2d 879 (La. 1977) 4, 5

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 7

Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), *cert. denied* 440 U.S. 960 (1979) 5

Other

Ohio Civ. R. A 4 3

RESTATEMENT (SECOND) OF TORTS, Sec. 566 (1977) 6

No. 80-100

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October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS HERALD, and J. THEODORE DIADIUN,
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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The first event which occurred in chronological sequence was a dual High School wrestling match between Maple Heights High School and Mentor High School, both local schools in Northeastern Ohio. The Maple Heights wrestling coach was Mike Milkovich who is also the plaintiff in the Libel action and the respondent herein. At that match an altercation, i.e. pushing, shoving and punching occurred among the spectators and the respective team

wrestlers, resulting in minor injuries to several of the wrestlers. Following that, the Ohio High School Athletic Association held an administrative hearing to determine responsibility for the incident and held the host school, Maple Heights, responsible. This resulted in the Maple team being placed on probation for the 1975-76 school year and the team declared ineligible to compete in the forthcoming state wrestling tournaments. A letter of censure was also directed to Coach Milkovich.

A suit in Franklin County Common Pleas Court in Columbus Ohio, was filed on behalf of the wrestlers, by their parents, styled *Ray Barrett, et al. v. OHSAA,* in which Coach Milkovich was not a party. His appearance at that trial was as a witness only. The issues in that case involved Due Process at the Administrative level, property rights of the wrestlers to participate in Tournaments, and incidentally, background evidence as to what had occurred at the Wrestling Match. A decision in that case was rendered granting injunctive relief, and rescinding the letter of censure. The matter was appealed to the District Appellate Court of Ohio, and affirmed. The defendant reporter, Ted Diadiun was present at the Match, and the following OHSAA Administrative Hearings but not at the due process trial.

Approximately one (1) day after the Franklin County Common Pleas decision the Article was published which was the subject matter for the Libel suit filed in Lake County Common Pleas Court of Ohio captioned "Maple Beat the Law with the 'Big Lie'."

The Trial

On April 30, 1975 the libel suit, *Milkovich v. News Herald,* was filed with the Lake County Common Pleas Court of Ohio.

The action proceeded to trial and plaintiff's case included evidence of a film showing the controversial match. Cross-examination of Ted Diadiun established that he, the sports reporter, was not present at the trial in Franklin Common Pleas Court, had not read the transcript of that trial, and that his only link with that trial was a telephone conversation with Dr. Harold Meyer, a witness, who testified he never told Diadiun, that Milkovich lied at the trial (T 112, 113). At the close of plaintiff's case defendants moved for a directed verdict which was granted.

The Decision of the Court of Appeals

The Appellate Court reversed and held there was sufficient evidence presented in accordance with state evidentiary law Ohio Civ. Rule A 4 (Appendix 16a), so as to deny the Motion for Directed Verdict. In support it cited the evidence that the defendant reporter had not attended the Trial nor read the transcript. Further, that the defendant knew the Court had made a finding of where the truth lay, contrary to the Article captioned the "Big Lie." From this evidence the Court concluded reasonable minds could come to different conclusions on the issue of Actual Malice and thereby created a jury question.

The language cited by Petitioner should be considered along with omitted Court language following Petitioner's Brief (P. 9, 10, A 12a) viz:

1. Cited Language:

> "It would appear that, though the press might be at liberty to criticize the judicial process and the

results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person."

2. Omitted Language:

"Whether, in a given case, it constitutes a reckless disregard of the truth, is not in our opinion, a question of law, but a question of fact based on the evidence before the Court."

The Ohio Court of Appeals, reversed the Decision of the Trial Court.

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The Article contains the caption in bold print "Maple Beat The Law With The 'Big Lie'." Such a statement is clearly a statement of fact, and not constitutionally protected. The difference between fact and opinion has been expressed by the Louisiana Supreme Court:

> "The crucial difference between statement of fact, and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writers' opinion, or as a statement of existing fact". *Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977).

The Article refers to OHSAA Board of Control's decision to suspend the wrestling team and censure their coach; that Milkovich misrepresented the things that happened at the OHSAA Hearing; that Diadiun was present at the wrestling match, and that Maple told the "Big Lie" (Appendix Petitioner P. 27). All factually having no privity with The Franklin County Common Pleas Court, about which the big lie was published. In fact that Trial did not address itself to responsibility or fault, but to issues of Administrative Due Process vis-a-vis The Wrestlers. It was obvious the Reporter, having no knowledge of what transpired, assumed Milkovich's fault was the issue. The ordinary person when reading this Article must understand and conclude, it is a statement of fact and not opinion since it implies a factual reporting of a previous decision by the OHSAA.

Buckley v. Littell, 539 F.2d 882, 895 (2nd Cir. 1976), *cert. denied* 429 U.S. 1062 (1977) statement that journalist had "lied" was held to be an assertion of fact and defamatory.

Assuming arguendo, that petitioner, reporter Diadiun's statement, of the "Big Lie" and his inference that Coach Milkovich had lied at the Franklin County Court Trial can be characterized as "opinion" in form, it should be treated as a statement of fact for constitutional protection purposes since it was an "opinion" which did not state the facts on which it was based. Opinions which do not state the facts upon which they are based, but which infer or *imply* defamatory facts, should be treated as statements of fact, and therefore deemed constitutionally protected only if made without knowledge or reckless falsity. *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Mashburn v. Collin*, 355 So.2d 879 (La. 1977); *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and RESTATEMENT (SECOND) OF TORTS Sec. 566 (1977).

A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication.

In the instant case, the expression of "opinion" was not based upon disclosed facts, but implied there were undisclosed facts upon which the opinion was based. Diadiun's "opinion" statement that Milkovich lied his way "out of a jam" implied that Milkovich had lied under oath at the due process hearing in the Franklin County Common Pleas Court. The "undisclosed facts" which take this statement outside the realm of absolutely privileged opinion are the statements Coach Milkovich made at the Trial which would allegedly contradict what actually happened (what Diadiun perceived happened at the February 1974 wrestling meet). Diadiun asserted in the Article, in essence that Milkovich lied in Court (Franklin County Common Pleas) *without indicating what was said at the trial.* Indeed, Diadiun did not attempt to ascertain what was said or what issues were addressed at the due process hearing. He did not attend the Trial, did not review a transcript of the proceedings, and did not familiarize himself with the issues being addressed at the Trial. Finally, it was established that Dr. Harold Meyer, OHSAA Commissioner and Diadiun's source for the Article, did *NOT* tell Diadiun that Coach Milkovich lied at the due process trial (T 112; 113).

These facts, *combined* with Diadiun's knowledge that a judicial determination of "truth" had already been made in favor of Milkovich, may be regarded (as the Ohio Court of Appeals correctly concluded) as a "reckless disregard of truth so, as to constitute 'Actual Malice', as to be actionable libel of a public person" (Ohio App. Opinion p. 8). This decision was limited to a ruling on a Motion for Directed Verdict, and accordingly, does not prejudice defendant publisher from presenting truth or any other defense it may have. It simply held that truth as a defense was a jury determination and not a matter of law, at that stage in the Trial proceeding. This is a different concept of law than that presented by Petitioners, that the Court's finding of where the truth lay deprived them of their First Amendment privileges, and their right to present truth as a defense. Again, the import of the Court's decision simply meant, truth as a defense was a jury function and not a matter of law.

Even applying the refined *New York Times* standard as set forth in *Garrison v. Louisiana,* 379 U.S. 64 (1964) the defendant publisher's conduct and comments fall outside the scope of constitutional protection. In *Garrison v. Louisiana, supra,* this Court held:

> "Only those false statements made with a high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."

Such a "high degree of awareness" of the probable falsity of the lying charges has been established in this case. There was ample evidence from which a jury could have concluded that there was reckless disregard by the defendant publisher regarding the truth or falsity of the Article. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967).

Further, the Ohio Court based its finding on several different kinds of evidence including a prior judicial determination of truth, which was not conclusive but cumulative in nature, and any portion of that evidence standing alone without prior judicial determination, as considered evidence, could have been the basis of the decision without raising any constitutional questions.

This is a procedural and evidentiary question, which is a proper and legitimate function of State Courts and does not per se raise constitutional questions nor should it invoke the jurisdiction of this Court.

CONCLUSION

For the reasons expressed a Writ of Certiorari should not be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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Dated: September 4, 1980

No. 80-100

In the Supreme Court of the United States

October Term, 1980

Supreme Court, U. S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIA[illegible],
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Motion for Leave to File a Brief As Amici Curiae by The Beacon Journal Publishing Company; Chillicothe Gazette; The Cincinnati Enquirer; The Cincinnati Post; The Cleveland Press; The Columbus Citizen-Journal; The Dispatch Printing Company; The Dix Newspapers; The Independent (Massillon); Lorain County Printing & Publishing Company; The Marietta Times; News-Herald (Port Clinton); News-Messenger (Fremont); The Niles Daily Times; The Plain Dealer (Cleveland); The Repository (Canton); The Toledo Blade Company; The Tribune Company and The Vindicator Printing Company; and Brief in Support of the Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

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TABLE OF CONTENTS

Table of Authorities II

Motion for Leave I

Brief Amici Curiae:

Interest of Amici Curiae 1

Summary of Argument 5

Argument 6

I. The Decision of the Ohio Court Creates an Intolerable Chilling Effect on the Reporting of Judicial Proceedings 6

II. The Decision of the Ohio Court Should Be Reviewed Because It Conflicts with Constitutional Determinations of the United States Supreme Court 10

A. The Ohio Court Unconstitutionally Creates a Conclusive Presumption that Statements which Differ from Judicial Findings Are False 10

B. The Ohio Court Unconstitutionally Strips Critics of Judicial Findings of Their Rights to Judicial Scrutiny of the Sufficiency of Evidence in Libel Actions 13

Conclusion 16

Appendix:

Letter of Petitioners Granting Leave to File Brief Amici Curiae 17

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919) 8
Associated Press v. Walker, 388 U.S. 130 (1967) 14
Bailey v. Alabama, 219 U.S. 219 (1911) 11
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 15
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 13
Bridges v. California, 314 U.S. 252 (1941) 12
Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1972) 8
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 5, 6
Craig v. Harney, 331 U.S. 367 (1947) 12
Gannett Co. v. De Pasquale, 443 U.S. 368 (1979) 5
Garrison v. Louisiana, 379 U.S. 64 (1964) 11, 12
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 7, 8, 14
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 15
Hansberry v. Lee, 311 U.S. 32 (1940) 13
Herbert v. Lando, 441 U.S. 153 (1979) 11
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 5
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 9
Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) 15
McNees v. Cincinnati Street Ry. Co., 152 Ohio St. 269, 89 N.E.2d 138 (1949) 7
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 14
Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) 9

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 5, 9
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 7, 8, 10-11, 12, 13-14, 15
Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979) 14
Parklane Hosiery v. Shore, 439 U.S. 322 (1979) 13
Pilkington v. Saas, 25 Ohio L. Abs. 663 (Ct. App. 1937) 6
Posin v. A.B.C. Motor Court Hotel, Inc., 45 Ohio St.2d 271, 344 N.E.2d 334 (1976) 7
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 8
Richmond Newspapers, Inc. v. Virginia, No. 79-243 (U.S. slip op. July 2, 1980) 5, 13
St. Amant v. Thompson, 390 U.S. 727 (1968) 15
Schultz v. Reader's Digest Ass'n, 468 F. Supp 551 (E.D. Mich. 1979) 6
Shallenberger v. E. W. Scripps Publishing Co., 8 Ohio N.P. (n.s.) 633 (C.P.), *aff'd* 32 Cir. Dec. 283 (Ct. App. 1909) 8
Smith v. California, 361 U.S. 147 (1959) 7
Speiser v. Randall, 357 U.S. 513 (1958) 7
State of Ohio v. James V. Barbuto, No. 80-4-432 (Ohio C.P., Summit Co., sentence handed down Aug. 8, 1980) 8-9
State of Ohio v. James V. Barbuto, No. 80-5-577 (Ohio C.P., Summit Co., sentence handed down Aug. 8, 1980) 8-9
Time, Inc. v. Pape, 401 U.S. 279 (1971) 10, 15
Vandenberg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975) 15
West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940) 6
Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947) 8

Constitutions

U.S. Constitution

Amendment I ..... *passim*

Amendment XIV ..... *passim*

Law Reviews

Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957) 13

Stephenson, *Thorns In Their Sides: Courts and Their Critics in Florida*, 4 FLA. ST. U. L. REV. 449 (1976) 9

Constitutional Law - Defamation - The New York Times *Standard and Reports of Judicial Proceedings*, 37 OHIO ST. L. J. 881 (1976) 5

Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After Gannett v. De Pasquale, 44 ALBANY L. REV. 455 (1980) 9

Other (Periodicals)

Graham, *The Secret Trial of John Connally*, THE NEW REPUBLIC, June 21, 1975, at 7 10

Treatises

14 O. JUR. 2d *Courts* § 220 (1955) 6

No. 80-100

In the Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIADIUN,
Petitioners,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Motion for Leave to File a Brief As Amici Curiae by The Beacon Journal Publishing Company; Chillicothe Gazette; The Cincinnati Enquirer; The Cincinnati Post; The Cleveland Press; The Columbus Citizen-Journal; The Dispatch Printing Company; The Dix Newspapers; The Independent (Massillon); Lorain County Printing & Publishing Company; The Marietta Times; News-Herald (Port Clinton); News-Messenger (Fremont); The Niles Daily Times; The Plain Dealer (Cleveland); The Repository (Canton); The Toledo Blade Company; The Tribune Company and The Vindicator Printing Company

The publishers of 25 newspapers in the State of Ohio, namely, *Akron Beacon Journal, Alliance Review, The Blade* (Toledo), *Chillicothe Gazette, The Chronicle-Telegram* (Elyria), *The Cincinnati Enquirer, The Cincinnati Post, The Cleveland Press, The Columbus Citizen-Journal, The Columbus Dispatch, The Crescent-News* (Defiance), *The Daily Jeffersonian* (Cambridge), *The Daily Record* (Wooster), *The Independent* (Massillon), *The Marietta*

Times, News-Herald (Port Clinton), *News-Messenger* (Fremont), *The Niles Daily Times, The Plain Dealer* (Cleveland), *The Record Courier* (Ravenna-Kent), *The Repository* (Canton), *The Times-Gazette, The Times Leader* (Martins Ferry—Bellaire), *The Tribune Chronicle* (Warren), and *Youngstown Vindicator,* join together to move the Court for leave to file a brief as *amici curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioners, The Lorain Journal Company, *The News-Herald* and J. Theodore Diadiun, has been obtained. The consent of the respondent, Michael Milkovich, has been requested and refused. As publishers of newspapers of general circulation in Ohio, movants believe that their ability to serve the public has been greatly encumbered by the decision below.

Movants believe that their brief as *amici curiae* will aid this Court by (1) clarifying the impact of the Court of Appeals decision on publishing in Ohio; (2) describing, from movants' own experiences, how this case, if it stands, will inhibit reporting and comment on the administration of justice in Ohio; and, (3) elucidating why the case's inconsistency with well-established tenets of constitutional libel law militates toward a review by this Court.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying Brief in Support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 80-100

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THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIADIUN,
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INTEREST OF AMICI CURIAE

Amici are publishers of 25 newspapers of general circulation within the State of Ohio. They furnish the public with news and commentary on matters of importance

to a democracy, including, frequently, reports on civil or criminal proceedings in the judicial branch of government.

Located throughout Ohio from small towns to the largest cities, they represent a group uncommonly broad and diverse in terms of their sizes, resources and editorial viewpoints. Their combined circulation exceeds two million each weekday through publication of the following newspapers:

Akron Beacon Journal (daily circulation of approximately 162,000), published by The Beacon Journal Publishing Co. in Akron, Ohio.

The Blade (daily circulation of approximately 170,000), published by The Toledo Blade Co. in Toledo, Ohio.

Chillicothe Gazette (daily circulation of approximately 17,000), published by Gannett Co., Inc. in Chillicothe, Ohio.

The Chronicle-Telegram (daily circulation of approximately 40,000), published by Lorain County Printing & Publishing Co. in Elyria, Ohio.

The Cincinnati Enquirer (daily circulation of approximately 187,000), published by Gannett Co., Inc. in Cincinnati, Ohio.

The Cincinnati Post (daily circulation of approximately 150,000), published by The E. W. Scripps Co. in Cincinnati, Ohio.

The Cleveland Press (daily circulation of approximately 301,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The E. W. Scripps Co. in Cleveland, Ohio.

The Columbus Citizen-Journal (daily circulation of approximately 115,000), published by The E. W. Scripps Co. in Columbus, Ohio.

The Columbus Dispatch (daily circulation of approximately 202,000), published by The Dispatch Printing Co. in Columbus, Ohio.

Seven daily newspapers published by The Dix Newspapers:

Alliance Review (Alliance, circulation of approximately 14,000).

The Crescent-News (Defiance, circulation of approximately 18,000).

The Daily Jeffersonian (Cambridge, circulation of approximately 15,000).

The Daily Record (Wooster, circulation of approximately 28,000).

The Record Courier (Ravenna-Kent, circulation of approximately 26,000).

The Times-Gazette (Ashland, circulation of approximately 13,000).

The Times-Leader (Martins Ferry—Bellaire, circulation of approximately 24,000).

The Independent (daily circulation of approximately 18,000), published by Massillon Newspapers, Inc. in Massillon, Ohio.

The Marietta Times (daily circulation of approximately 15,000), published by Gannett Co., Inc. in Elyria, Ohio.

News-Herald (daily circulation of approximately 6,000), published by Gannett Co., Inc. in Port Clinton, Ohio.

News-Messenger (daily circulation of approximately 16,000), published by Gannett Co., Inc. in Fremont, Ohio.

The Niles Daily Times (daily circulation of approximately 6,000, a substantial part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by Phoenix Publications Inc. in Niles, Ohio.

The Plain Dealer (daily circulation of approximately 393,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Plain Dealer Publishing Co. in Cleveland, Ohio.

The Repository (daily circulation of approximately 66,000), published by Thomson Newspapers Inc. in Canton, Ohio.

The Tribune Chronicle (daily circulation of approximately 45,000, almost all of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Tribune Co. in Warren, Ohio.

Youngstown Vindicator (daily circulation of approximately 103,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Vindicator Printing Co. in Youngstown, Ohio.

If the decision of the Ohio Court of Appeals for the Eleventh District is permitted to stand, all these *amici* will be adversely affected in their ability to inform the citizens of Ohio about the administration of justice.

SUMMARY OF ARGUMENT

The decision of the Ohio Court of Appeals, Eleventh District, should be reviewed because it will severely restrict the free flow of information about judicial proceedings and the administration of justice in Ohio.

The decision below rules that in libel cases brought by public officials or public figures, the issue of "actual malice" must be decided by a jury whenever the defendant's statement differs from a judicial finding. The case truncates centuries of common law and almost two decades of constitutional law to fashion new libel law for Ohio of awesomely intimidating proportions. *Amici* view this mutation as denying them, when a published statement takes issue with a court's finding, at least three fundamental constitutional protections afforded to libel defendants: (1) the defense of truth, (2) the defense that the statement is a non-actionable opinion, and (3) the procedural right to have the constitutional sufficiency of evidence of "actual malice" determined by a court as a matter of law.

Accordingly, *amici* seek the review and relief of this Court not merely for the public's right to receive information about what transpires in its courts,[1] but also to rebut the astonishing suggestion of the decision below—that the judiciary may constitutionally determine what opinions the public may safely express.

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1. *See Richmond Newspapers, Inc. v. Virginia*, No. 79-243, slip op. of Mr. Chief Justice Burger at 18-19 (U.S., July 2, 1980); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 413 n.2 (1979) (Blackmun, J., concurring in part and dissenting in part); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). *See generally Constitutional Law - Defamation - The* New York Times *Standard and Reports of Judicial Proceedings*, 37 OHIO ST. L. J. 881 (1976).

ARGUMENT

I. The Decision of the Ohio Court Creates an Intolerable Chilling Effect on the Reporting of Judicial Proceedings.

The decision of the Ohio Court of Appeals, Eleventh District, will severely stifle news reporting and commentary on judicial affairs throughout Ohio.[2] This Court has stressed the importance of accepting review in such cases where "a failure to decide the question now will leave the press in [the State] operating in the shadow . . . of a rule of law . . . the constitutionality of which is in serious doubt. . . ." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 486.

As demonstrated in the Petition for a Writ of Certiorari,[3] the decision below has three principal impacts on libel cases in Ohio: (1) it conclusively presumes the falsity of any statement that differs from a court's finding, regardless of whether the speaker had any involvement in the court case producing such finding, (2) it discards constitutional protection afforded to statements of opinion, whenever they might be deemed to differ from a court's finding, and (3) it concocts a *per se* rule that warns a speaker that he may contradict a court's finding only at

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2. Decisions of a Court of Appeal in Ohio are highly persuasive authority throughout the state, as well as binding within the counties of the particular judicial district. *Pilkington v. Saas*, 25 Ohio L. Abs. 663, 667 (Ohio App. 1937), 14 O. JUR. 2d *Courts* §220 (1955). They are also persuasive authority for federal courts applying Ohio law. *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 561 (E.D. Mich. 1979), citing *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940).

3. *Amici* specifically endorse all arguments made in the Petition but do not repeat them here unless warranted for clarity's sake.

the peril of a complete libel trial, void of the procedural safeguards which ensure that a jury verdict is supported by the constitutionally requisite "clear and convincing" evidence of actual malice.[4] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The effect of this decision on newspapers considering whether to publish a statement or opinion contrary to a court's finding could be at once insidious and pervasive. If the publication is deemed libelous, the newspaper could not avoid the disruption and expense of a full libel trial. Moreover, it would be precluded at trial from establishing the truth of its statement, and could not successfully contest as a matter of law an unsupported jury finding of "actual malice." Inevitably, some will choose, as this Court has recognized, to " 'steer far wider of the unlawful zone' ". *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). And, to the extent that self-censorship occurs, the decision below effectively undermines the entire premise for this Court's addition of a constitutional dimension to libel law in the United States—the realization that the public is deprived of essential information about its government by rules which impose strict liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. As this Court noted, quoting *Smith v. California*, 361 U.S. 147, 153-154 (1959):

> " '[T]imidity in the face of . . . liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally

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4. Although the decision below was technically concerned with whether a directed verdict in favor of defendants was proper, Ohio decisions have established that in Ohio, as in the federal courts, the standards for the granting of a directed verdict are the same as those for granting a judgment n.o.v. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St. 2d 271, 275, 344 N.E.2d 334 (1976); *McNeese v. Cincinnati Street Ry. Co.*, 152 Ohio St. 269, 269, 89 N.E.2d 138 (1949). Thus, a decision overturning a directed verdict is, in effect, a decision that a contrary jury verdict on such evidence would be proper.

suppress directly. . . . [S]elf-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.' " *New Orleans Times Co. v. Sullivan*, 376 U.S. at 278-79.[5]

The sweep of the decision below commands editors to scrutinize virtually all coverage of matters before courts for possible collision with a court's finding. Newspapers can question whether a criminal defendant has been wrongfully exonerated or convicted, whether witnesses have told the truth, or whether judges, prosecutors or attorneys have acted properly, only at their peril. For the consequence, if the statement or comment is deemed defamatory, is a libel trial with greatly attenuated constitutional safeguards as envisioned by the court below.[6]

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5. Such self-censorship is damaging because it diminishes the stock of ideas and opinions upon which the public can draw, thus hampering the ability of the people to engage in that " 'uninhibited, robust, and wide-open' " debate on public affairs which is at the core of the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-40, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270. This Court has repeatedly recognized that the popular perception of the validity of ideas is continually subject to change. The ability of the people to govern themselves wisely is therefore best promoted by preserving an "uninhibited marketplace of ideas" which permits opinions to be tried against the broadest possible spectrum of competing thoughts. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also* Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), and dissent of Brennan, J. in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 184-192 (1972).

6. Theoretically, the decision below could even be utilized by a judge bringing a libel action against a newspaper for criticism of his judicial determination. The judge's own determination would deny the defense of truth to the newspaper. This is not an especially unlikely scenario since judges in Ohio, as elsewhere, have been known to sue for libel, *e.g.*, *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365, 74 N.E.2d 340 (1947); *Shallenberger v. E. W. Scripps Publishing Co.*, 8 Ohio N.P. (n.s.) 633 (C.P.), *aff'd* 32 Cir. Dec. 283 (Ct. App. 1909), and have been convicted of wrongdoing in the performance of their duties. *See, e.g.*, for a recent example, *State of Ohio v. James V. Barbuto*, Case Nos. 80-5-577 and 80-4-432 (Summit Co., Ohio, Common

(Continued on following page)

Other prepublication dilemmas would present themselves. When a newspaper discovered new evidence suggesting perjury or, worse, that the wrong person had been convicted of a crime, it would have to weigh the risks of defending a libel trial against its obligation to the public. Even the most courageous editor would be sobered by the realization that in a libel trial, the newspaper would be helpless to contest the prior conviction which would establish the "truth" against it.[7] The same sort of choice would face a reporter who, as in the instant case, sought to give the public his own first-hand information or perspective about underlying facts in a civil suit.

Perhaps the greatest impediment to the public's right to receive information about judicial proceedings may emerge, if the decision below stands, when newspapers are inhibited from publishing reports about events unresolved by litigation. While covering a pending lawsuit, for example, a newspaper could not safely comment on a witness' testimony which the newspaper had reason to believe was false. Only by waiting until the veracity of the witness was determined by a court could the newspaper publish without fear that the "truth" would be established by the court contrary to its report.[8] Similarly, a news-

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Footnote continued—

Pleas Court, sentence handed down Aug. 8, 1980) (judge of probate court convicted of dereliction of duty, intimidation, and gross sexual imposition). *See generally*, Stephenson, *Thorns In Their Sides: Courts and Their Critics in Florida*, 4 FLA. ST. U. L. REV. 449 (1976) for a historical account of clashes between the judiciary and the press in that state.

7. The newspaper, of course, would have no standing to appeal another's prior criminal conviction directly. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

8. First Amendment freedoms are squelched as surely by delay as by suppression for all time. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (1975) (In-chambers opinion of Blackmun, J.); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560-61, 606, 609 n.39 (1976). *See Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After* Gannett v. De Pasquale, 44 ALBANY L. REV. 455, 481 n.131 (1980).

paper reporting or commenting on any indicted public official's conduct would do so knowing that a trial (in which the newspaper could not directly participate) might decide the matter differently. The public official would then have the considerable advantage of having falsity established in his subsequent libel suit.[9]

Conflicts between a reporter's understanding of facts and a court's determination are commonplace in journalism and often arise simply from the passage of time or the vagaries and limitations of the criminal justice system. Other differences can arise out of the reporter's need to interpret ambiguous legal decisions under short deadlines (*see, e.g., Time, Inc. v. Pape,* 401 U.S. 279 (1971)), or from the differences between the testimony admitted in the controlled courtroom setting, and the evidence available to the journalist. (*See, e.g.,* Graham, *The Secret Trial of John Connally,* The New Republic, June 21, 1975, at 7.) Disregarding these differences and the desirability of providing the public with timely news of current events, the decision below elevates judicial pronouncements to unheard-of heights.

II. The Decision of the Ohio Court Should Be Reviewed Because It Conflicts with Constitutional Determinations of the United States Supreme Court.

A. The Ohio court unconstitutionally creates a conclusive presumption that statements which differ from judicial findings are false.

The decision below unconstitutionally denies your *amici* the protections provided by *New York Times Co. v. Sul-*

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9. The decision below only discusses the consequences of a publication appearing after a judicial finding has been made. However, logically, a newspaper would be estopped on the issue of truth as readily by a subsequent judicial finding as by a prior one. Only the issue of reckless disregard of the truth might be treated differently.

livan and its progeny by creating a conclusive presumption that unreversed judicial findings are true.[10]

In the series of cases beginning with *New York Times Co. v. Sullivan,* this Court held that a public official or public figure can prevail in a libel action only by proving, *inter alia,* that the allegedly libelous statement is false. *Herbert v. Lando,* 441 U.S. 153, 175-176 (1979), *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). This limitation on libel actions cannot be circumvented by means of presumptions since " '[t]he power to create presumptions is not a means of escape from constitutional restrictions.' " *New York Times Co. v. Sullivan,* 376 U.S. at 284, quoting *Bailey v. Alabama,* 219 U.S. 219, 239 (1911). Yet, the decision below removes from the critic of judicial findings even the right to intro-

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10. The court articulated this presumption in the following two passages:

a. "It would appear that, though the press might be at liberty to critcize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person." Pet., A. 12a.

b. (in affirming the exclusion of the transcript of the wrestlers' injunction hearing [Tr. 734-35] on the ground that only the injunction court's opinion could be considered on the issues raised therein):

"The trial judge [in the injunction action] was the arbiter of the facts. It was his duty to weigh and decide what was determined by the evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the 'big lie' article so as to exonerate the defendants from either 'actual malice' or such reckless disregard of the truth as to constitute malice as set forth in Sullivan, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein." Pet., A. 13a-14a.

duce evidence, in a later defamation action, to show that he was right and the court was wrong.

In a sense, the judiciary is set up as an absolute arbiter of truth whose findings may be contradicted only at the extreme peril of the speaker. Such an action smacks of the discredited approach of the Sedition Act of 1798. *See New York Times Co. v. Sullivan,* 376 U.S. at 273-277.

Neither the Constitution nor this Court has ever accorded the judiciary such a powerful role in dictating what opinions the citizens of this country can safely express. Indeed, the presumption has always been to the contrary—that courts, like other branches of government, are fully subject to the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. . . ." (Dissent of Judge Cook, Pet., A. 18a, quoting *New York Times Co. v. Sullivan,* 376 U.S. at 269.)[11]

Criticism of the protagonists in our nation's courtrooms has long been upheld even when it has scorched judges for faulty decisions. *See Garrison v. Louisiana,* 379 U.S. at 66 (judges' decision to deny funds for a district attorney probe raises "interesting questions about the racketeer influences on our eight vacation-minded judges"); *Craig v. Harney,* 331 U.S. 367, 369 (1947) (a decision constituted a "travesty on justice"); and *Bridges v. California,* 314 U.S. 252, 276 (1941) (decisions called "outrageous"). Indeed, the

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11. Although the decision below acknowledges an abstract right to "criticize the judicial process and the results of a given case," Pet., A. 12a, the acknowledgement is empty. The context of the comment makes it clear that the court only concedes such a right where the criticism does not directly reflect on some individual in a defamatory manner. As demonstrated in Section I, *supra,* such a limitation leaves unprotected a great deal of commentary that is vital in a democratic society.

freedom to speak one's mind about the wisdom of the judiciary was recently declared by this Court to be an important First Amendment check against "decisions based on secret bias or partiality", *Richmond Newspapers, Inc. v. Virginia,* slip op. of Mr. Chief Justice Burger at 11-12.

Judicial findings are not to be "confused with absolute truth." Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281, 315 (1957). On the contrary, the very possibility of judicial error limits the probative value of such findings. This Court has repeatedly declared that the Due Process Clause is violated when a litigant is prevented from disputing the findings of a prior action, unless he had a "full and fair" opportunity to litigate the issues in that previous lawsuit. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971), *Parklane Hosiery v. Shore,* 439 U.S. 322, 327 n.7 (1979), *Hansberry v. Lee,* 311 U.S. 32, 40 (1940). This Court should not now allow important First Amendment protections to be eroded by permitting a conclusive presumption of judicial infallibility to choke would-be critics of the courts.

B. The Ohio court unconstitutionally strips critics of judicial findings of their rights to judicial scrutiny of the sufficiency of evidence in libel actions.

The court below ruled that judicial review of evidence in a libel case brought by a public official or public figure should be confined merely to determining whether a reasonable mind would possibly draw *any* inference of actual malice from any of the facts presented. Assignments of Error 2 (Pet., A. 9a) and 6 (Pet., A. 10a), sustained in Pet., A. 13a. Such a constraint plainly contravenes one of the most basic protections afforded by *New*

York Times Co. v. Sullivan—the protection against arbitrary jury verdicts based upon constitutionally insufficient evidence.

The tendencies of juries to punish unpopular opinion alone, *see, Monitor Patriot Co. v. Roy,* 401 U.S. 265, 276-77 (1971), not to mention the complexities of modern libel trials, has persuaded this Court and others of the need for careful judicial scrutiny of the evidentiary adequacy of a libel plaintiff's case. *E.g., Gertz v. Robert Welch, Inc.,* 418 U.S. at 349; *Orr v. Argus-Press Co.,* 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979). Yet, by its holding that a libel case must be sent to a jury whenever a defendant contradicts a judicial finding, Pet., A. 12a, the decision below automatically sanctions a type and quality of evidence of actual malice insufficient to meet the demanding constitutional standards of "clear and convincing proof" or "convincing clarity" laid down in *Gertz v. Robert Welch, Inc.,* 418 U.S. at 342 and *New York Times Co. v. Sullivan,* 376 U.S. at 285-86, respectively. Pet., A. 17a-18a. The bare fact that a writer was aware of a court decision contrary to his own views constitutes no basis at all for an inference of doubt, especially when coupled with additional evidence, such as brought out in this action, that the writer's opinions were based on his first-hand observations and a telephone interview with an officer of one of the litigants. Pet., A. 17a-18a.[12]

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12. Not the least disturbing implication of the decision below is its wholly inappropriate incursion into newsgathering. By insisting upon the use of official sources, such as a judicial opinion, the Ohio court attempts to dictate a legally-acceptable standard or methodology for reporting the news. Sportswriter Diadiun's handling of his article under deadline pressure falls comfortably within the conduct of a long line of cases where plaintiffs have been unable to prove "actual malice." *E.g., Associated Press v. Walker,* 388 U.S. 130, 158-59 (1967) (source

(Continued on following page)

Moreover, the decision below deprives the trial court of its mandated role to review the evidence in a libel action to ascertain whether it meets the "clear and convincing" standard. As far back as *New York Times Co. v. Sullivan,* this Court noted the need for courts to make "an independent examination of the evidence to ensure that the proof of actual malice has "the convincing clarity which the constitutional standard demands." *Id.* at 285-86. The duty of a court to make such an examination has been sustained repeatedly since. *Time v. Pape,* 401 U.S. at 284, *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 83 (1967), *St. Amant v. Thompson,* 390 U.S. 727 (1968), *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6, 11 (1970).

Footnote continued—
gave every indication of being trustworthy, his information was internally consistent, and his information was consistent with background facts known to defendant); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) (reporter relied on previously trustworthy but biased second-hand source without checking with anyone who had participated directly in the events); and *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947, 959-60 (D.D.C. 1976) (defendant relied on a previously-used source in a "hot news" situation, when defendant knew plaintiff had denied the charges). Nevertheless, the Ohio court's rejection of the subjective standard for actual malice articulated in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968) and adoption of an objective standard of the reasonably prudent journalist portends judicial second-guessing about the editing of newspapers. *Cf., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

CONCLUSION

For the reasons herein stated, as well as for the reasons stated in the Petition for a Writ of Certiorari, your *amici* respectfully request the Court to grant certiorari in this action.

Respectfully submitted,

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August 12, 1980

Re: Lorain Journal v. Milkovich

Dear Mr. Sanford:

Pursuant to Rule 36 of the Rules of the United States Supreme Court and on behalf of petitioners, The Lorain Journal Company, The News Herald and J. Theodore Diadiun, we hereby consent to your filing of an amicus curiae brief in the case of Lorain Journal Company, et al. v. Michael Milkovich (No. 80-100) which is presently before the Court on petition for a writ of certiorari. I understand that the amicus curiae brief will be filed on behalf of a group of publishers of Ohio newspapers which group includes Dix Newspapers, Inc., Vindicator Printing Company, and a number of others.

Sincerely,

Floyd Abrams

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MOTION FILED
AUG 25 1980

No. 80-100

IN THE

Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF THE OHIO NEWSPAPER ASSOCIATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
MOTION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1
BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	4
Preliminary Statement	4
Argument In Support Of Reasons For Allowance Of Writ Of Certiorari	5
Conclusion	13

TABLE OF AUTHORITIES

Cases	Page
Bon Air Hotel, Inc. v. Time Inc., 426 F.2d 858 (5th Cir. 1970)	10
Bridges v. California, 314 U.S. 252 (1941)	7, 11
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	6, 7, 11
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	9, 10
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)	10
Herbert v. Lando, 441 U.S. 153 (1979)	9, 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	2, 6, 8, 10
Pennekamp v. Florida, 328 U.S. 331 (1946)	11
Speiser v. Randall, 357 U.S. 513 (1958)	8
St. Amant v. Thompson, 390 U.S. 727 (1968)	7, 10
Time Inc. v. Firestone, 424 U.S. 448 (1976)	7
Time Inc. v. Hill, 385 U.S. 374 (1967)	2
Time Inc. v. Pape, 401 U.S. 279 (1971)	8
Wasserman v. Time Inc., 424 F.2d 920 (D.C. Cir. 1970), *cert den.* 398 U.S. 940 (1970)	10

Constitutional Provisions

U.S. Const. amend. I	2, 5

Other Authorities

Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975)	7

IN THE

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No. 80-100

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, and
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Petitioners,

v.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF THE OHIO NEWSPAPER ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Ohio Newspaper Association hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of counsel for the petitioners has been obtained, but the Ohio Newspaper Association has been unable to obtain the consent of counsel for respondent.

The Ohio Newspaper Association (hereinafter "ONA") is a non-profit corporation organized and existing under the laws of the State of Ohio. Its membership consists of approximately 250 daily and weekly newspapers in Ohio, representing the major proportion of the circulation of newspapers in this state.

The ONA was organized to promote the best interests of its publishers and their readers. It has appeared as *amicus curiae* representing the interests of that membership in the Ohio courts. By design, the ONA's structure keeps it in contact with the membership on a variety of points of legal as well as operational interest. The ONA feels, therefore, that it is in a unique position to represent the concerns of the collective Ohio press in this matter.

It is from that perspective that the ONA voices its support for this Court's granting of the petition for certiorari. The decision of the Ohio Court of Appeals in this case, that a newspaper may not contradict or comment on the testimony of a public figure who has prevailed at trial, creates an uncertainty and hesitancy in the working press which is contrary to the spirit of this Court's decisions on the freedom of press clause in the first amendment. That unique proposition of law is a two-edged sword, both blades of which strike against the Ohio press. The press will either restrain itself from reporting disfavorably on public figures who appear in judicial proceedings, or it may continue to present such reports but face an increased risk of litigation with more probable exposure to liability. Either choice, restraint or a fear of litigation, would have a chilling effect on the Ohio newspapers' exercise of the first amendment freedom of the press. *See, Time Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Thus, the ONA asks leave of this Court to file its brief *amicus curiae* in support of the writ of certiorari. Even while recognizing this Court's reluctance to add to its burden by granting leave to file *amicus curiae,* we nevertheless be-

lieve and respectfuly represent that the uncertainty created by the decision appealed from is damaging to the public interest and, if followed, will restrain the working press in the fulfillment of its first amendment responsibilities. Resolution of this issue will have significant consequences for the Ohio press who provide news and information to the general public. The ONA hopes that its desire to present the concerns of those most seriously affected will provide assistance to the Court in resolving the constitutional issues which appear in this case.

Respectfully submitted,

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No. 80-100

IN THE

Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
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MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Ohio Newspaper Association, as *amicus curiae* in support of the petition for writ of certiorari in this case, agrees with and adopts those matters presented by petitioners as required by Rule 21 of this Court to be set out in advance of argument amplifying the reasons relied on for the allowance of the writ.

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Ohio Newspaper Association, as *amicus curiae,* respectfully urges this Court to grant the petition for certiorari in this case to determine the degree of protection the first amendment affords the press when it refutes the honesty of a public figure's testimony in a prior judicial proceeding. The Supreme Court of Ohio has let stand a decision by the Eleventh District Court of Appeals of Ohio holding that a trial court in a libel action may not – as a matter of law – direct a verdict for a defendant newspaper against a public figure whose testimony at a separate, non-libel trial has been accepted by that other trial judge. This *amicus curiae* submits that this decision is not, should not, and cannot be found consistent with either the recent history of this Court's decisions or the constitutional provisions of the first amendment applicable to the free press.

As appears more fully herein, the decision below has had and will continue to have a dramatic impact on the newspaper industry of this state. The consequential self-restraint which the Ohio press now faces has a direct bearing upon the gathering and dissemination of news. The *ratio decedendi* of this case rests in these two sentences by the Court of Appeals:

> Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

It may, however, be more plainly put for the effect it has on the Ohio press: neither a party who prevails at trial or

one of his witnesses, regardless of his stature as a public figure, may have his veracity challenged by the press. That novel proposition, that even a judicial determination where a witness's honesty is not at issue constitutes the unassailable truth, leaves the press in a state of uncertainty and requires clarification. Taken at its face value, the decision leaves the press little choice but to retreat to a position of self-censorship that this Court has perceived as dangerous and has so carefully guarded against since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

There must be no doubt that this case concerns federal constitutional issues, and not state law. The decision to reverse the trial court did not rest upon an application of the Ohio standard governing the propriety of directed verdicts. The decision that public figures are shielded from critical comment by the press after testifying at a separate trial was the necessary predicate for the action taken by the Court of Appeals. In effect, the Court of Appeals translated a question of constitutional law properly to be decided by the trial judge into a question of fact to be decided by a jury. That decision, conflicting as it does with the interpretations this Court has made of the actual malice standard, has created a constitutional issue which requires final resolution in this forum.

The urgency for action by this Court is apparent if the alternatives are kept in mind. As recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the fact that the state appellate courts have remanded a case for further trial proceedings after having finally determined a federal constitutional issue is not preclusive of this Court's jurisdiction. To the contrary, where the "failure to decide the question now will leave the press . . . operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt," this Court's consideration of that federal issue is particularly appropriate. *Id.* at 486. Immediate review is thus called

for when "[d]elaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.'" *Id.* at 485-486 (citations omitted). That spectre of years of uncertainty on the part of the working press in Ohio is what affords the compelling reasons for allowing this writ of certiorari.

While considering the particularities of this case and the urgencies for their consideration here, this *amicus curiae* would recall a few of the propositions regarding the freedom of press which this Court has endorsed. Nearly forty years ago it was recognized that "it is a prized American privilege to speak one's mind, although not always with perfect good taste . . . ." *Bridges v. California*, 314 U.S. 252, 270 (1941). To that end, and "to insure the ascertainment and publication of the truth about public affairs," the Court has required "that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Indeed, as recognized by Mr. Justice Stewart in his seminal speech to the Yale Law School, the press has "sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself." Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975). As the law of this case now stands, it not only conflicts with those ideals, but "savages the cherished values encased in the First Amendment." *Time Inc. v. Firestone*, 424 U.S. 448, 476 (1976) (Brennan, J., dissenting).

Because this case concerns the issue of where "the line between speech unconditionally guaranteed and speech which may legitimately be regulated" will be

drawn, *Speiser v. Randall*, 357 U.S. 513, 525 (1958), it is appropriate to follow the established rule that this Court will inquire as to whether the court below correctly applied the constitutional standard to the facts of the case. *New York Times Co.* at 285; *Time Inc. v. Pape*, 401 U.S. 279 (1971). Both the facts of this case and at least the initial constitutional standards are clear and relatively undisputed.

Ted Diadiun, a reporter and petitioner, attended a 1974 high school wrestling match in which one of the teams was coached by the respondent, Michael Milkovich. The reporter saw the match turn into a brawl after which four of the other team's members received hospital treatment. In Diadiun's view, and as he reported it at the time, the respondent's behavior contributed to the combative atmosphere and the brawl which occurred. The Ohio High School Athletic Association (hereinafter the "OHSAA"), the body which sponsors and governs interscholastic athletics in Ohio, held an administrative hearing of inquiry which Diadiun attended. The hearing, at which respondent Milkovich testified on his own behalf, resulted in the suspension of Milkovich's team from the state wrestling championships and a public censure and two year probation for the respondent.

Soon after, a suit for injunctive relief was filed on behalf of the wrestlers in state court. That action resulted in a preliminary injunction banning the OHSAA from carrying on its suspension against the respondent's team. As a result of that suit, two items significant to this case occurred. First, reporter Diadiun wrote the allegedly libellous article in which he claimed that Milkovich lied in his testimony during the injunction hearing. Second, the court below held as a matter of law that the result of the preliminary injunction hearing determined the veracity of Milkovich's testimony and precluded the trial court at the ensuing libel trial from deciding as a matter of law that Milkovich had not shown with convincing clarity the

actual malice necessary to prevail in a libel action against the press by a public figure.[1]

There are several other significant facts. The court that issued the injunction did not decide or even recite in its opinion anything regarding the testimony concerning the actual events of the 1974 wrestling match, but only held that due process required that the high school wrestlers not be deprived of participating in the state championships as a result of the type of hearing held by the OHSAA. Reporter Diadiun did not attend the injunction hearing, but he conferred three separate times with Dr. Harold Meyer, then Commissioner of the OHSAA, who did attend that hearing as well as the OHSAA proceedings, and whose reports lead Diadiun to conclude that Milkovich's testimony differed markedly from that before the OHSAA and from the facts observed by Diadiun at the wrestling match itself.

The constitutional standards applicable to this case are clear up to the novel concept of insularity from attack devised by the Ohio Court of Appeals below. Because the respondent was found to be a public figure, the requirement of actual malice as recently summarized by this Court became an essential element of his case:

> Under this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant "in fact entertained serious doubts as to the truth of his publication." . . . Such "subjective awareness of probable falsity," . . . may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Herbert v. Lando, 441 U.S. 153, 157 (1979) (citations omitted). *See also, Curtis Publishing Co. v. Butts*, 388 U.S.

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[1] Milkovich's status as a public figure was determined by the trial court in this case and was not an issue on respondent's appeal. The evidence showed that he was a prominent wrestling coach with substantial national and regional recognition in the wrestling sport world.

130 (1967), and *New York Times Co., supra.* To prevail, actual malice must be proven with convincing clarity. *Herbert,* 441 U.S. at 170. Based upon this Court's admonition in *New York Times Co.* that the press not be subjected to "the pall of fear and timidity imposed upon those who would give voice to public criticism," 376 U.S. at 278, it is also now commonly held that "[a]ctual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict." *Bon Air Hotel, Inc. v. Time Inc.,* 426 F.2d 858, 864 (5th Cir. 1970). *See also, Wasserman v. Time Inc.,* 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J., concurring), *cert den.* 398 U.S. 940 (1970).

Against this background, the trial court directed a verdict against respondent by finding that the evidence did not meet the constitutional standard of actual malice with convincing clarity. The reversal of that decision, predicated erroneously on the supposition that a prevailing party in another lawsuit receives a shield from attack in the press, also ignored the several other amplifications by this Court of what does not constitute actual malice. Hatred of the libel plaintiff, for example, cannot be the standard for showing actual malice, for that would inhibit the functioning of the press. *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970). Investigatory failure similarly does not meet the test. *Curtis Publishing Co.,* 388 U.S. at 153. Neither does reliance upon the reports of others, even when coupled with a failure to make an independent investigation prior to publishing. *New York Times Co.,* 376 U.S. at 287-288. Indeed, the reversal of the directed verdict here seems to completely ignore this Court's decision in *St. Amant v. Thompson,* 390 U.S. 727 (1968), in which the defendant, like the reporter here, had no personal knowledge of the immediate event spoken of, relied on the word of another as to the truth of that event, made no attempt to verify the event with others who might

also know about it, did not even consider the possibly defamatory nature of his statement, but whose behavior was found by this Court to fall short of the reckless disregard of the truth necessary to show actual malice.

Even more insidious to the press, and crying equally for clarification by this Court is the Ohio Court of Appeals suggestion that direct personal inquiry was required of the reporter to avoid the risk created by its decision. The court below commented that, instead of relying on the report of an informed source who did attend the trial, Ted Diadiun should have either personally attended the injunction trial, or ordered and read its transcript, if he wanted to avoid being found in reckless disregard for the truth. In light of the obvious burden such a requirement would put upon the press, its potential chilling effect is manifest. The timeliness of reporting a newsworthy event has already been considered favorably to reporters by this Court in a decision involving contempt convictions for reporting on ongoing cases. *Bridges v. California,* 314 U.S. 252 (1941).

But it is the function of the press, particularly in its role as reporter and commentator on judicial proceedings, that begs for a review of this case in this forum. It is clear that society relies on the press for reporting on that judicial process and that the press serves "to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). It has even been recognized that court procedure and legal conclusions which at times confound the professional are by their nature more difficult for the layman to interpret and report than are other areas of public concern. *Pennekamp v. Florida,* 328 U.S. 331, 371 (1946) (Rutledge, J., concurring).

It is equally clear that good and bad decisions result from courtroom proceedings and judicial determinations. No one has yet ventured the temerity to suggest the in-

fallibility of what emanates from the bench. No one, that is, but the court from which this petition is brought.

The Ohio Newspaper Association as *amicus curiae* does not intend to suggest that the mere holding of a press card provides a license to irresponsibly attack the integrity of another. But that is not what happened here. The reporter had a background of personal knowledge regarding the facts of this case, and he inquired several times of an informed observer as to the testimony of the respondent at trial. Yet because the side for which the respondent testified prevailed on a procedural due process issue, the press is forbidden from commenting on the truthfulness of that testimony.

At least insofar, then, as the Ohio court's decision on these facts pertains, the press is to be discouraged from unfavorably commenting on the substance of a witness's testimony whose side prevails on a nicety of procedural law. Henceforth, a civil litigant whose veracity at trial is conclusively impugned but who late in the game succeeds on jurisdictional or other grounds is immune from comment in the press because, in the words of the court below, the comments "in the news article were made after judicial ascertainment of where the truth lay." That should not be the inhibiting rule by which the Ohio press must play.

If the motion for certiorari is denied and this case returns for trial under the rule of the Court of Appeals, the Ohio press will find itself on the horns of a dilemma. A favorable verdict for the publisher will leave unanswered an important and threatening constitutional question. A verdict for the respondent will find the defendant publisher knocking at the door of this Court again, but only after an extended appeal process repeating what brings us here now. In the meantime, and in either event, the Ohio press will be forced to function over a period of years under a cloud of uncertainty and confusion with at least a degree of timidity and self-censorship. That result would be to

the public's detriment and contrary to the purpose and intent of the constitutional safeguards afforded the press.

CONCLUSION

Based upon all of the foregoing, and the fact that the court below has decided an important question of federal law that has not been, but should be, settled by this Court and which conflicts with the applicable decisions of this Court, this *amicus curiae* respectfully urges that the petition for certiorari be granted and that this case be heard upon its merits.

Respectfully submitted,

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